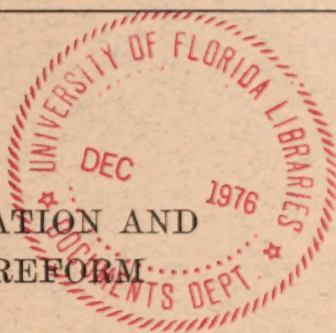


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FEDERAL REGULATION AND
REGULATORY REFORM

REPORT

BY THE

SUBCOMMITTEE ON OVERSIGHT AND
INVESTIGATIONS

OF THE

COMMITTEE ON INTERSTATE AND
FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES
NINETY-FOURTH CONGRESS

SECOND SESSION



OCTOBER 1976

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OCTOBER 1976

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¹ On detail from the General Accounting Office.

FOREWORD

The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights. . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories as much as the concept of a fourth dimension unsettles our three-dimensional thinking.

—Justice Robert H. Jackson, 1952.

No man is a warmer advocate for proper restraints and wholesome checks in every department of government than I am; but I have never yet been able to discover the propriety of placing it absolutely out of the power of men to render essential Services, because a possibility remains of their doing ill.

—President George Washington, 1787.

This report: "Federal Regulation and Regulatory Reform" is, we believe, one of the most comprehensive studies ever made on this subject. It is the product of nearly two years of investigation that included 28 days of public hearings, some 220 witnesses from both government and the private sector, a hearing record in excess of 3,500 pages and extensive written submissions from individuals and agencies. It represents our commitment to more effective government on behalf of the American public.

A government truly of and for the people must be accountable to them. An important part of this accountability is oversight by the Congress which, in turn, is answerable to the citizens its Members collectively serve.

Federal regulation of commerce for the public convenience and necessity goes back to 1789, the first year of government under the United States Constitution, when Congress passed measures signed into law by President Washington for the regulation of ocean-going ships and the coasting trade and for the administration of customs laws. The growth of Federal regulation over the past two centuries stems not from the whims of politicians or from some conspiratorial scheme to build big government. As this report demonstrates, regulatory laws were created to cope with problems experienced by people. As long as people desire the protection of their government, the important concern is not merely the scope of federal regulation, but its quality and efficiency. The Subcommittee's recommendations for improving the independence and integrity of regulatory agencies are directed toward these goals.

In offering this study, it is our hope that the Subcommittee's report will serve both as a reaffirmation of our faith in representative government and as a catalyst for needed reorganization and reform.

Sincerely,

JOHN E. MOSS,

Chairman, Subcommittee on Oversight and Investigations.

WASHINGTON, D.C., *October, 1976*

ACKNOWLEDGEMENT

The Subcommittee gratefully acknowledges the assistance of the U.S. General Accounting Office; the American Law, Economics, and Government Divisions of the Library of Congress; and the Congressional Budget Office in the preparation of portions of this report. The Subcommittee also acknowledges the able editorial assistance of Mr. Marcus Rosenbloom.

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FEDERAL REGULATION AND REGULATORY REFORM

PART I

INTRODUCTION

SECURITIES AND EXCHANGE COMMISSION

FEDERAL TRADE COMMISSION

ENVIRONMENTAL PROTECTION AGENCY

FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 1

INTRODUCTION

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FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 1

INTRODUCTION

Forty-four years ago, a great American President described the Federal regulatory agency as a "tribune of the people." To some, looking back across the years, those words may seem a hollow promise. To this Subcommittee, they represent a goal of this government and a standard of achievement; sometimes equaled, sometimes ignored, always pertinent.

That standard, we believe, makes clear both the promise and the failure of Federal regulation today. To the extent regulatory agencies have based their decisions on the broad public interest, they have often fulfilled their purposes, affording Americans better health, more competitive markets, essential information, and public protection against fraud and deceit. To the extent they have seen their role as representatives of special interests, promoters of narrow economic purposes, or servants of entrenched bureaucracy, they have not been tribunes of the people.

We have studied regulation and regulatory reform for many months. Our reasons for engaging in this extended inquiry are varied. As Members of Congress we are aware that our public service depends, in the final analysis, solely on the consent of the people we serve. Do our delegate agencies understand this as well?

As Members of Congress we or our predecessors have struggled to enact laws to improve the quality of life and redress some of the inequities in our system. How well have we succeeded?

As Members of Congress we believe we have a continuing obligation, through legislative oversight, to measure against a permanent standard the performance of the agencies we have created.

In the several hundred pages of this report—and the thousands of pages of hearings and documents supporting its conclusions and recommendations—the reader will find harsh words for some Federal regulatory agencies and some regulators. There are examples of agencies which have, we believe, intentionally failed to carry out the law. There are also examples of agencies, and individual Federal employees, who have been effective and have carried out their responsibilities and more. There are tales of courage in these pages and instances of pure cowardice.

What we found most clearly is that regulation cannot be summed up in catch words, simple phrases, or rhetoric. It is a many-faceted process which has sometimes succeeded and sometimes failed. More important, regulation is a dynamic process, like our government itself and like our society. We find that regulation has changed over the years and

continues to change even as we study it. If the Federal regulatory agencies do not meet the standard of achievement we have set—and many do not—they offer, at least, hope of improvement and a means for moving toward a just society. It is toward that goal that we have directed this study.

REGULATION AND ITS CRITICS

Attacks on Federal regulation have driven its image to an historic low. Though often self-serving, the criticism is useful. Reform of Federal regulation has become accepted almost universally as a critical need, reflecting intense concerns that cross party lines, that run deeply in both Houses of the Congress, and that are shared by Congressional leaders with those in the Executive agencies.

Criticism of regulation nonetheless is characterized by contradictory arguments. Some urge a simplistic repeal of law, on the grounds that we are plagued with too much government and too much Federal regulation. Others look not to the quantity of regulation, but to its quality, asserting that the basic defect of regulation is that it reflects the interests in the industries regulated to the near exclusion of other legitimate interests. Still others cite failures of policy or structural deficiencies leading to cumbersome procedures and excessive delay.

Common to many of these critics is the assumption that government has lost touch with the governed and that bureaucracy is inflexible. Some, but not all, add that the regulatory agencies are responding, not to the people, or even to special interests, but to their own need to survive.

To determine the true problems of regulation, their nature and extent, and possible remedies, the Subcommittee on Oversight and Investigations began its own study of the operations of Federal regulatory agencies in April 1975. It was appropriate for the Subcommittee to undertake this study because of its jurisdiction over a number of these. This report refers mainly to 9, including 6 independent regulatory commissions and 3 executive branch regulatory agencies:

Independent commissions

- Consumer Product Safety Commission
- Federal Communications Commission
- Federal Power Commission
- Federal Trade Commission
- Interstate Commerce Commission
- Securities and Exchange Commission

Executive branch agencies

- Environmental Protection Agency
- Food and Drug Administration
- National Highway Traffic Safety Administration

Our policy, detailed below, was to look in depth at their performance, to assess the validity of congressional mandates and the quality of execution and especially to question whether regulation seemed to be serving a useful purpose justly and efficiently.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

The Subcommittee finds that the primary goal in the reform of Federal regulation should be to make regulatory programs function more effectively on behalf of the consuming public. We also have concluded that regulatory reform can be accomplished only if approached agency-by-agency and program-by-program and not with any sweeping, across-the-board solution. It is irrational to subject economic regulation and other types of regulations, including health, safety, and environmental, to the same criteria and to the same solutions. The process of reform is thus laborious, requiring full recognition of the complexity of the Federal regulatory processes.

Although we firmly believe that reform must proceed agency-by-agency, we have nonetheless identified certain common failings in the agencies studied.

All suffer from a critical defect, an insufficient response to the public they were created to serve. Our studies confirm earlier observations that the actions of regulatory agencies reflect more than anything else their primary attention to the special interests of regulated industry and lack of sufficient concern for underrepresented interests. Given the frequent communication between regulated industry and regulatory agencies, and given the cohesive structure of regulated industry, this finding should not be surprising.

The Subcommittee has concluded that, if durable change is to be accomplished, there will have to be fundamental adjustments in the political environment of regulation and new structures for increasing the accountability of agency actions to broad public interests. Regulation relating to health and safety, in particular, must not be biased by extraneous interference on behalf of special interests.

Our first set of recommendations is therefore directed at creating new structures and a political environment which supports rather than impedes regulation in the public interest by—

1. establishing new mechanisms of effective public participation, to offset the dominance of regulated industry in agency proceedings;

2. strengthening Congressional oversight to increase the accountability of the agencies to elected representatives of the public;

3. merging three important health and safety regulatory functions: vehicle safety, food and drugs, and product safety into a single commission to reduce duplication of functions, to insulate two regulatory programs from political interference associated with their location in the executive branch, and to strengthen accountability to the Congress;

4. reorganizing Federal energy regulation and information gathering in a single independent agency; (These regulatory functions should remain insulated from programs designed to promote the development of energy resources and research, public education, or advocacy associated with such promotion. These promotional functions should remain within the Executive Branch. Coordinated energy policy and planning functions would remain a necessary part of both an independent energy agency and an Executive Branch agency.)

5. increasing the openness of agency proceedings to facilitate public participation; and,

6. increasing the independence of regulatory agencies from executive dominance.

The second set of general recommendations is intended to increase the effectiveness and fairness of regulation by reforming existing agency practices. We propose that the Federal government—

1. eliminate weaknesses in the enforcement efforts of regulatory agencies by introducing improved and evenly applied sanctions;

2. improve the process for selecting regulators of high quality, and strengthen conflict-of-interest laws and regulations governing their performance on the job;

3. eliminate unnecessary delay and cumbersome procedures;

4. eliminate the misapplication of benefit/cost analysis in rulemaking procedures; and

5. separate promotional and regulatory functions by removing promotional programs from independent regulatory agencies.

The Subcommittee recommends reduction of regulation by—

1. consolidating Federal programs in energy regulation and in safety and health regulation;

2. eliminating duplication and overlap in and between regulatory programs;

3. eliminating anti-competitive regulation unnecessary to the continued protection of the public; and

4. terminating individual regulations or regulatory programs determined, upon review, to be ineffective.

Finally, the Subcommittee recommends continued study and development of mechanisms to enable citizens to protect their interests more effectively both in and outside agency proceedings by—

1. restructuring Federal citizen class suit provisions or, in the alternative, establishing the right of a State attorney general to bring class actions;

2. reforming the doctrine of standing to sue, to widen access of consumers to the Federal courts; and

3. increasing the role of small claims courts as a means of consumer redress.

These recommendations are described in further detail in chapter 17. In addition, recommendations addressed to individual agencies are set forth at the end of each of the chapters which immediately follow.

THE SUBCOMMITTEE'S STUDY

On April 20, 1975, Subcommittee Chairman John E. Moss announced the commencement of a "comprehensive study" of Federal regulatory agencies. The study was to include an assessment of the independence, performance, and economic effects of the activities of regulatory agencies under the Subcommittee's jurisdiction.

In June 1975, the Subcommittee sent to each of the nine regulatory agencies a detailed questionnaire covering such topics as history and goals; staffing, procedures, and operations; planning and evaluation; operations and workload; outside sources of advice; public interaction; Office of Management and Budget (OMB) reviews; freedom of information activity; litigation capability; rulemaking; and, in the case of commissions, commission meetings, periods of service of

commissioners, and prior and subsequent employment of commissioners. As agency responses were received in July, 1975, the staff commenced to analyze the data for the purpose of identifying the issues and obstacles to effective regulation.

In September 1975, the Subcommittee issued a print entitled: "An Economic Evaluation of the OMB Paper on 'The Cost of Regulation and Restrictive Practices,'" prepared by the Office of Economic Analysis, U.S. General Accounting Office. The paper was in response to the President's charge that the combined cost to consumers of government regulation and restricted practices in the private sector amounted to "something in the order of \$2,000 per family." The President based this estimate on an OMB paper.¹ The General Accounting Office concluded:

In our opinion, OMB's summary of the cost of government regulation at \$2,000 per year for the average American family has substantial shortcomings. The OMB compendium does not provide a methodical structure for carefully analyzing and tabulating the cost of government regulation. . . .

The OMB does not make a clear distinction between the gross cost and the net cost associated with government regulation. The gross cost of any undertaking is the total economic cost associated with the project. The net costs, however, are the residual that remains when an undertaking's benefits are subtracted from its gross costs. . . .

The OMB approach in this effort is akin to the hypothetical corporation issuing an annual report which lists the corporate expenses in its summary statement but neglects to report the corporate revenues.

In November 1975, the Subcommittee conducted hearings jointly with the Senate Committee on Commerce and the Committee on Government Operations, addressing the issue of improving the quality of appointments to regulatory agencies. These hearings together with other efforts provide the basis for findings in Chapter 12.

In December 1975, the Subcommittee held a series of meetings with agency officials to review responses to the questionnaire, to discuss issues identified in the questionnaire returns and from other sources, to identify areas of further information needed by the Subcommittee, and to seek suggestions from agency officials on needed reforms.

From February through July 1976, the Subcommittee conducted a series of intensive hearings on regulatory reform, exploring the most important issues of performance with agency heads. Following the agency hearings, the Subcommittee for 2 days heard testimony from public witnesses on agency performance and on the need for reform.

¹ As the following chart indicates, the budgets of the agencies studied (excluding non-regulatory functions) amount to less than one-third of one percent of the annual Federal budget and have not grown significantly as a percentage of the total Federal budget.

COMPARISON OF BUDGET AUTHORITY OF 9 REGULATORY AGENCIES TO
TOTAL U.S. BUDGET *

[In percent]

Comparison of budget authority	1971	1972	1973	1974	1975
9 regulatory agencies to total United States budget.....	1.032	1.171	2.814	2.125	2.240
9 regulatory agencies, excluding nonregulatory functions, to total United States budget.....	.221	.297	.318	.328	.322

* Inflation during this period has averaged 7.5 percent annually.

The hearings covered a total of 28 days, receiving testimony from approximately 220 witnesses and compiling a record in excess of 3,500 printed pages. A number of issues left unresolved in the hearings were pursued subsequently with agency officials through letters, interviews, and, in two cases, extended investigation. The record of these hearings has been published with additional materials in six volumes which should be viewed as supplementary to this Report.

In August of 1976, the Subcommittee issued a print entitled: "The Number of Federal Employees Engaged in Regulatory Activities," a staff paper prepared for the Subcommittee by the Congressional Budget Office. The paper reports that the Federal government devoted 92,172 man-years of effort during fiscal year 1976 to activities defined by CBO as "regulatory." Under a refined definition, excluding positions not directly related to regulation such as public information, consumer education, legislative liaison, and research, the total is 84,773. Either total falls significantly short of recent claims that there are more than 100,000 regulators employed by the Federal government. In a letter of transmittal accompanying the report, Subcommittee Chairman John E. Moss noted:

The 84,773 figure is small compared to the total number of Federal workers. 4,561,400 persons are employed by the Federal government according to the President's proposed 1977 budget. Thus, about 2 percent of all Federal employees are directly, but not exclusively, involved in regulation. Approximately 45 percent of all Federal workers are in military uniform. The 84,773 figure is also small compared to persons employed by one of America's leading manufacturers, General Motors, which now has 756,000 persons on its payroll.

In addition to the questionnaires, meetings, hearings, and studies, several papers have been prepared for the Subcommittee by Congressional Research Service and by the General Accounting Office.² Moreover, Members of the Subcommittee and its staff have spent hours at the agencies themselves, interviewing, attending meetings, and studying information and materials made available by the agencies.

THE SUBCOMMITTEE'S REPORT

From the several possible approaches to writing a regulatory reform report, the Subcommittee chose to study directly the performance of the regulatory agencies. This performance is measured principally

² The Subcommittee utilized the following Congressional Research Service, Library of Congress, reports:

(a) "Issue Paper on Economic Impacts of Commission Regulation," Douglas N. Jones, Economics Division, June 1975.

(b) "Regulatory Agencies: Their Organizational Status and Political Accountability," Ronald C. Moe, Government and General Research Division, September 1975.

(c) "Executive Appointments in Independent Regulatory Commissions," Ronald C. Moe, Government and General Research Division, October 1975.

(d) "Major Consumer/Public Interest Issues Facing the Nine Regulatory Agencies," various authors in Economics Division, December 1975.

(e) "Independence of Federal Regulatory Agencies," by Stuart Glass, American Law Division, August 1976.

(f) "The Authority to Conduct Litigation on Behalf of Federal Agencies: The Relationship of the Justice Department to Independent Regulatory Agencies," Robert D. Polling, American Law Division, June 1976.

The subcommittee utilized, in particular, the following General Accounting Office reports:

(a) "Financial Disclosure System for Employees of the Food and Drug Administration Needs Tightening," FPCD-76-21, January 19, 1976.

(b) "Use of Cancer-Causing Drugs in Food-Producing Animals May Pose Public Health Hazard: The Case of Nitrofurans," MWD-76-85, February 25, 1976.

(c) "Review of EPA Monitoring of Auto-Exhaust Emission Controls of Vehicles Actually on the Road," to be published in October, 1976. Presented as testimony on April 7, 1976, printed in Regulatory Reform Hearings before the Subcommittee on Oversight and Investigations, 94th Cong., 2d sess., vol. V, p. 3 *et seq.* (1976).

A complete list of all GAO Reports on the regulatory agencies is contained in Appendix B.

against the mandate assigned to each agency by the Congress. The next nine chapters each begin with a description of an agency's current statutory responsibilities. In setting forth each agency's responsibilities, the Subcommittee has emphasized the components of its authority which are intended to protect the public or serve the public's interest.

The analyses and case studies which follow the description of each agency's responsibilities serve several purposes:

- to determine on the basis of the agency's experience the appropriateness of the law and the need for amendment or repeal;
- to identify achievements and failures as signals for possible recommendations of exemplary performance or reform; and
- to explore systemic weaknesses, such as structural defects in public representation or enforcement procedures, the process of recruiting and selecting qualified personnel, or the provisions for planning and evaluation.

Chapter 11 analyzes the relationship between the agencies and the Congress.

Four systemic problems affecting all regulatory agencies are explored in chapters 12, 13, 14, and 15:

- weaknesses in the current system for selecting and appointing commissioners, administrators, and other high level regulatory officials;
- methods of assuring consumer participation in agency proceedings;
- overlapping, conflicting, and duplicative regulation; and
- use and misuse of benefit/cost analysis.

Chapter 16 explores some alternative approaches to improving regulations.

The Subcommittee's general findings and recommendations are offered in chapter 17. It is followed by a set of appendices, including summary data from agency responses to the Subcommittee's questionnaire of June 1975 and to further inquiries.

IMPORTANT DISTINCTIONS

The Subcommittee's study rests heavily on a distinction between (a) economic regulation and (b) regulation designed to protect the public from health and safety hazards. Although some economic regulation must be retained in sectors of the economy where competitive forces do not function (as in the production and sale of oil and natural gas), the Subcommittee looked for opportunities to reduce economic regulation. We found several to recommend, as reported in the final chapter, but some agencies ripe for reducing regulations, such as Civil Aeronautics Board and the Federal Maritime Commission, are outside the jurisdiction of the Subcommittee.

In contrast, the Subcommittee concluded it is necessary to strengthen health and safety regulation, particularly to guard against undetectable or unavoidable hazards, such as the alarming buildup of cancer-causing agents in drinking water, food, and air.

The study also draws a distinction between the 6 independent regulatory commissions and the 3 executive branch agencies. The distinction proved important in assessing White House personnel

policies, the role of the Office of Management and Budget, and the question of the relationship between the agencies and the Congress.

Finally, the study took into account differences between agency decisions resulting from a process of rulemaking and decisions using cumbersome adjudicatory proceedings. This distinction is important in assessing, for example, the activities of the Federal Trade Commission. Within rulemaking, a further distinction is necessary, between formal (on-the-record hearings, providing cross-examination, etc.) and informal (notice and comment) proceedings. This latter distinction applies particularly to health and safety regulation, as reflected in the Subcommittee's general conclusions.

PREVIOUS REGULATORY REFORM STUDIES ³

Concern for reforming Federal regulation is not new. Efforts to reorganize Federal regulation have arisen in every Administration over the past four decades.

A pattern has been established: a major study is undertaken, a report is published, and reform proposals are offered. The first report was issued in 1937 by President Roosevelt's Committee on Administrative Management, known as the Brownlow Committee. The report charged that the independent regulatory commissions were a "headless fourth branch" of government.

The independent commissions present a serious immediate problem. No administrative reorganization worthy of the name can leave hanging in the air more than a dozen powerful, irresponsible agencies free to determine policy and administer law. Any program to restore our constitutional ideal of a fully coordinated Executive Branch responsible to the President must bring within the reach of that responsible control all work done by these independent commissions which is not judicial in nature. That challenge cannot be ignored.

The Committee recommended that the commissions be abolished and their functions be distributed among the departments. Once relocated, the functions would be divided between an administrative section directed by a single administrator and a judicial section that would remain independent in the making of regulatory decisions. Few results can be traced to the recommendations emanating from the Brownlow report.

The first Hoover Commission (1947-1949) conceded that the regulatory commissions had a rightful place in the political system but had generally failed to live up to original expectations. Its recommendations tended to be concerned with structure rather than substance and were modest in scope.

The Hoover Commission argued that the regulatory commissions would be more effective and efficient if the administrative responsibilities were vested in the chairmen. The Commission noted also that there was little coordination between the commissions and the agencies in the executive branch with similar regulatory responsibilities. The Commission therefore recommended that there be established an Administrative Management Director in the Bureau of the Budget to "suggest ways and means to improve and thereby reduce the cost of disposing of business before administrative agencies."

³This section is based in part on a section entitled "Government Studies" in Moe, "The Federal Regulatory Agencies: Congress Studies Their Future," Government Division, Congressional Research Service, Library of Congress (Issue Brief Number IB75042, Updated June 9, 1976).

The report of the second Hoover Commission (1953-1955) supported the concept of an integrated legal staff within agencies under a General Counsel, improving internal procedures and separating where possible the judicial and executive functions of administrative agencies and increasing the independence of hearing examiners. The Commission also recommended an administrative court to try cases then handled by administrative agencies, and not a specialized court to review actions of administrative agencies. No significant changes in the organization and functions of independent regulatory commissions resulted from this Commission and its report.

Both the Kennedy and Johnson Administrations eschewed large public studies of governmental organization comparable to the earlier Hoover Commission. In 1960, President-elect John Kennedy requested James M. Landis to write a report on regulatory commissions and to suggest methods to improve the operations of these agencies. Landis proposed that the administrative powers of the chairman of the respective commissions be enhanced and that staff positions be made more attractive by delegating authority. He further suggested that regulatory policy formulation come under Presidential guidance to insure uniformity, such guidance to be provided by the establishment of several offices in the Executive Office of the President.

During this period, studies of regulation were pursued also by several committees of the Congress. Noteworthy among these efforts was the 1959-1960 investigation of the independent regulatory commissions by the Special Subcommittee on Legislative Oversight, a predecessor of this Subcommittee, under the Chairmanship of Oren Harris. During the 86th Congress, the Subcommittee held 52 days of hearings, "to examine the execution of the laws by the administrative agencies administering laws within the legislative jurisdiction of the parent committee, to see whether or not the law as the Congress intended in its enactment has been and is being carried out or whether it has been and is being repealed or revamped by those who administer it."

Included were hearings on television quiz shows and ex parte contacts in proceedings of the Federal Power Commission. The Subcommittee report, issued on January 3, 1961, included a compilation of the Subcommittee's recommended actions. It urged, for example, that all commissions:

(a) Review their investigatory procedures to insure that there shall be less reliance upon information derived from the regulated industry or other interested participants in proceedings before the commission and more reliance upon the independent investigatory results of the commissions themselves. This is particularly important in the field of granting licenses, renewals, and exemptions from regulations; and

(b) Establish and publish procedures setting forth the manner in which complaints by the public against practices of companies regulated by the commission will be handled. . . .

It also recommended to Congress that:

Provision should be made for administrative and civil sanctions and procedures whereby a commission can effectively enforce the statute and its own rules and regulations. Violators presently know that they can keep the fruits of their violation and go scot free because the drastic nature of existing sanctions prevents their effective application or because the cumbersome procedure for enforcing existing sanctions or penalties make them of no practical effect. . . .

The custom of writing reports on wholesale governmental organization was resumed during the Nixon Administration. In 1971, three

reports were issued by the President's Advisory Council on Executive Organization, the Ash Council. Two concerned executive departments and one dealt exclusively with independent regulatory commissions.

The underlying theme of the report on the independent commissions were not sufficiently accountable to either the President or the Congress.

Insofar as these commissions could be brought under Presidential guidance for purposes of policymaking, the President's Advisory Council argued, Congress would also be a beneficiary since such an arrangement would enhance the oversight function.

The regulatory commissions were viewed by the Ash Council as being essentially ineffective and unable to respond well and in a timely fashion to economic, technological, and social changes. This apparent inability to adapt to changing conditions was attributed by the Council to three factors: "collegial organization, the judicial cast of agency activities, and the misalignment of certain function responsibilities."

The Council recommended a major restructuring of the independent regulatory commission system.

To assure coordination of regulatory matters with national policy goals, to improve the management efficiency of regulatory functions, to improve accountability to the Congress and the executive branch, and to increase the probability of superior leadership for regulatory activities the transportation, power, securities, and consumer protection regulatory functions should be administered by a single administrator, appointed by the President. These functions should be performed by agencies respectively designated: Transportation Regulatory Agency, Federal Power Agency, Securities and Exchange Agency, and Trade Practices Agency.

In short, the Interstate Commerce Commission, Civil Aeronautics Board, and the Federal Maritime Commission would be combined within a new Transportation Regulatory Agency. The promotional subsidy-granting activities of the Civil Aeronautics Board would be transferred to the Department of Transportation. The Federal Trade Commission's consumer protection responsibilities would be vested in the Federal Trade Practices Agency while its antitrust enforcement responsibilities would be vested in a new Federal Antitrust Board, the latter to consist of a chairman and two economists, each appointed by the President with the consent of the Senate. Finally, the responsibilities of the Securities and Exchange Commission under the Public Utilities Holding Company Act would be transferred to the Federal Power Agency.

The Federal Communications Commission was specifically omitted from this list of plural-member commissions which were slated to become single administrator executive agencies. The changes and reforms directly attributable to the Ash Council report were negligible.

The Landis and Ash reports were written primarily from the perspective of the Executive Branch. What distinguishes this Subcommittee's study is that it is based on a detailed review of the operations of nine agencies. In addition, its focus is on the accountability of regulatory agencies to the Congress which created them and the need to create structures for increasing the responsiveness of agency decisions to the public interest and to consumer interests. A concurrent regu-

latory reform study, conducted by the Senate Committees on Commerce and Government Operations under the authority of Senate Resolution 71, is scheduled for completion in early 1977.

RANKING THE REGULATORY AGENCIES

The Subcommittee has ranked the nine regulatory agencies under its jurisdiction by measuring various aspects of the performance of these agencies as viewed in the chapters of this report, the Subcommittee's hearings, and the responses to the Subcommittee's June 1975 questionnaire. The nine agency chapters of this report are arranged according to this ranking, with the Securities and Exchange Commission placed first and the Federal Power Commission last. Criteria used in this ranking include the following aspects of agency performance: fidelity to public protection mandate defined by Congress; quantity and quality of agency activity; effectiveness of agency enforcement programs; and quality of public participation.

Judged by these criteria, the nine agencies fall into three distinct groups. In the top group are the Securities and Exchange Commission, the Federal Trade Commission, and the Environmental Protection Agency. Four agencies occupy positions in the middle: the National Highway Traffic Safety Administration, the Consumer Product Safety Commission, the Federal Communications Commission, and the Food and Drug Administration. At bottom, some distance from the others, are the Interstate Commerce Commission and the Federal Power Commission. The Subcommittee attaches less significance to ranking within each group than to placement in one group or another.

THE TOP GROUP

In the first group, the Securities and Exchange Commission and the Federal Trade Commission have both benefitted from recent congressional efforts at reform. Reform efforts at the Federal Trade Commission which pre-date the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1974 have accelerated over the past several years, as demonstrated by use of the authority now rooted in statute to issue substantive "trade regulation rules." The Commission has begun also to consider major antitrust and consumer protection problem areas including investigations and complaints directed at anti-competitive conditions in the petroleum, cereal, and automobile industries. Since the FTC reorganization during the early 1970's, the agency has been able to attract well qualified professionals and has become much more effective in its work.

The Securities and Exchange Commission has maintained consistently vigorous enforcement efforts over the past several decades. It has attracted qualified leaders to the commission and to its staff. Its courageous handling of the ongoing investigation of illegal corporate payments is commendable. Its resistance to White House efforts to install politically favored employees should be a model for all agencies.

The SEC's response to the Subcommittee's 1975 questionnaire, consisting of extensive essays composed specifically in response to the

questions, proved more helpful to the Subcommittee than the responses of any other agency. Although some room exists for improvement in the Commission's response to the 1975 Securities Act Amendments, the agency's ability to change its orientation and develop new programs is encouraging. Suggestions for further improvement are outlined in the SEC chapter.

The Environmental Protection Agency, like the Federal Trade Commission, has been able to attract a large number of well-qualified individuals. Operating frequently under tight statutory deadlines, the agency has made a good start at establishing programs for protecting the environment. When the agency has fallen behind schedule, environmental advocates have not hesitated to sue. As a result, the agency is now working under court order in shaping a number of its new programs. Despite significant failures, two of which are detailed in the EPA chapter, the agency is establishing itself as a formidable force in improving the environment. On occasion, EPA has displayed political courage in standing up to efforts by the Office of Management and Budget to undermine its programs. The agency also proved itself to be remarkably open to the numerous inquiries of this Subcommittee.

IN THE MIDDLE

In the second group of agencies, The National Highway Traffic Safety Administration, whose motor vehicle safety standards program began aggressively in 1966, has fallen into a period of minimal productivity in the past 5 years, as measured by its output of new vehicle standards. It has been unable to overcome continued intervention by other executive branch offices and the Congress, some clearly at the behest of regulated industry. NHTSA has needlessly tied itself in knots, partly in response to pressure from the Council on Wage and Price Stability and the White House, by performing benefit/cost studies which prove little and are not required by law. To its credit, the agency has held fast to its truck brake and bumper standards and has continued to support passive restraint systems, despite intense pressure to drop the idea. NHTSA is also able to claim part of the credit for the dramatic drop in the annual rate of fatalities on the Nation's highways.

The Consumer Product Safety Commission, newest among the regulatory agencies, was provided in 1972 with a mandate reflecting several of the reform measures now being urged for other agencies. The CPSC commenced operation in 1973 amidst expectations that it would soon develop into an aggressive cost-effective regulatory agency. Its performance to date has been disappointing. The agency has fumbled over arranging its priorities, run into complex problems in seeking to maximize public participation, and delayed launching an effective enforcement program. A definitive judgment on the Consumer Product Safety Commission will be possible only after its basic programs, including the prompt issuance of product safety standards, have had more time to operate.

Both the Federal Communications Commission and the Food and Drug Administration have been struggling to revise deeply rooted patterns of over-reliance on the industries they regulate. The Federal Communications Commission has shown signs only recently of loosen-

ing its close relationship with broadcasting and telephone industries. It has begun to encourage competition in the sale of telephone equipment and has opened more of the television market to cable television.

The Food and Drug Administration saddled with a panoply of advisory groups heavily weighted toward the regulated industry, and adroit at using the device of non-decision to "resolve" important policy questions, seems to be awakening somewhat to its public protection mandate, but at an extremely slow pace. Its response to oversight has been good, but lasting improvement, by such means as effective use of its imminent hazard suspension power (for hazardous foods, drugs, and devices) remains to be seen.

AT THE BOTTOM

A quantum jump downwards separates the Interstate Commerce Commission and the Federal Power Commission from all others. The infusion of talent that has lifted the performance of some agencies, such as the Federal Trade Commission and the Environmental Protection Agency, has seemingly passed the ICC and the FPC by. The oldest of the independent regulatory agencies, the Interstate Commerce Commission, was studied primarily regarding its railroad regulating functions and its enforcement program. The Subcommittee does not have jurisdiction over motor carriers. While the Commission did ultimately respond to Subcommittee hearings regarding its enforcement program, the response was slow.

The ICC remains mired in confusion over its appropriate regulatory function. It persists in enforcement actions directed at relatively trivial violations to the exclusion of violations with broader public import. We see reason to hope for a brighter future in the Commission's Office of Rail Public Counsel, potentially a prototype for an effective form of public participation in proceedings of all regulatory agencies.

The Federal Power Commission takes the cellar position because of its overt disregard of its congressional mandate. Specifically it has refused to maintain a program of "just and reasonable" natural gas prices consistent with its governing statutes and applicable court decisions. It has acted without sound evidence. It has not enforced the delivery of natural gas supplies to consumers. The Federal Power Commission has displayed a conscious indifference to the public beyond comparison with any other regulatory agency. The Subcommittee believes that this agency is in line for a major overhaul by the Congress.

FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 2

SECURITIES AND EXCHANGE COMMISSION

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CHAPTER 2

SECURITIES AND EXCHANGE COMMISSION

*I. Summary **

The Securities and Exchange Commission (SEC) has responsibility for implementing and enforcing the Federal securities laws. The statutes are the Securities Act of 1933 and the Securities Exchange Act of 1934. These provide for financial disclosure by companies whose securities are traded publicly and for regulation of the Nation's securities markets. The Securities Acts Amendments of 1975 confer on the Commission additional major responsibilities requiring it to play a much more active role in economic analysis and policymaking in the securities markets and facilitate establishment of a national market system and various related market mechanisms. The Commission is to use its authority to assure that present markets are competitive and that they permit development of a national market system. The purposes of the 1933 and 1934 Acts remain unchanged: to protect the public interest and public investors and to maintain fair and orderly trading. The 1975 Amendments, designed to achieve significant reforms, add: to foster fair competition by removing unnecessary regulatory restrictions and removing obstacles to competition.

Under the 1975 Amendments, the SEC has a mandate to reexamine exchange rules restricting the ability of member firms to effect trades otherwise than on exchanges. The Commission has been slow to perform that duty. It abrogated portions of these anticompetitive rules effective one year after the issuance of its order, and it has made no commitment to do anything about the remainder of the rules.

Underlying the episodes of illegal and questionable corporate payments, disclosed largely through the SEC's enforcement and voluntary compliance programs, is a significant failure of corporate accountability. In pursuing innumerable instances of such improper corporate payments and accounting practices, the Subcommittee believes the Commission and its staff have functioned admirably and in a highly professional manner. Nonetheless, the Commission bears some measure of responsibility for not having exercised its standard-setting and enforcement authority earlier regarding accounting practices.

The Commission has shown commendable resistance to political hiring pressures despite the practice of the White House Personnel Office of making politically motivated referrals to the SEC and insisting upon clearance of candidates appointed to SEC positions which are not in the competitive civil service system.

Despite important new responsibilities, the White House Office of Management and Budget (OMB) imposed severe restrictions on the Commission's budget. For fiscal year 1976, the Congress authorized \$51 million, based on the SEC's best estimate of what would be needed

*Much of the information contained in the background statement about the SEC is drawn from material supplied by the Commission in response to the Subcommittee's June 1975 questionnaire. The Commission's responses to selected Subcommittee questions are summarized, along with those from other agencies, in Appendix A to this Report.

to implement the new law. Only \$49.3 million was appropriated. The OMB disallowed all requests by the SEC for supplemental staff positions needed for implementation of its new securities laws responsibilities. For fiscal year 1977, the Congress authorized \$55 million which the OMB cut to \$53.1 million. The practical effect of these cuts is even greater than appears. At a time when securities registration statements, tender offers, and other financial reports have increased, the SEC found it necessary to transfer 35 employees from the Division of Corporation Finance, which reviews such financial reports. Moreover, despite the budget cuts, both the Divisions of Corporation Finance and Enforcement have been required to engage in unanticipated enforcement actions due to illegal and questionable corporate payment cases. More than 200 corporations have disclosed such information voluntarily to the SEC and 20 formal enforcement actions have been brought.

The Subcommittee recommends: (1) that the SEC promptly implement the law with respect to anticompetitive off-board trading rules, or request (with appropriate justification) that Congress amend the law.

(2) To restore confidence in the system of corporate accountability and to protect the public interest and public investors, the SEC should require to the maximum extent practicable uniform accounting principles and auditing standards, assure that certified public accountants are effectively independent of the corporation being audited, and enforce the corporate disclosure requirements of the Federal securities laws stringently.

(3) To neutralize the effect of politically motivated referral of candidates for SEC employment, whatever the source, it is recommended that the SEC place all referral documents in a file available for public inspection. Also, no staff positions should require a partisan political commitment within the SEC (or any other independent regulatory commission). Staff positions outside the competitive service should be only those legitimately involving a confidential or senior advisory position relationship with the commission; even in those cases, there should be no political clearance.

II. Mandate

A. INTRODUCTION

The Securities and Exchange Commission, perhaps the most prestigious of the independent regulatory agencies, has come to a crossroads. The agency and several of the fundamental statutes which it administers were direct products of the speculative boom of the Roaring Twenties and the ensuing Great Depression. As bankruptcies exposed abusive corporate financing and trading practices and appalling losses to individual investors and the American public, President Franklin Roosevelt and the Congress responded with the Securities Act of 1933.¹ With its strong emphasis on disclosure, the Act can be viewed as a corporate Freedom of Information Act for investors. Its sponsors believed that by requiring appropriate disclosure, purchasers of new corporate issues could protect themselves from the abuses which had proved so costly in the recent past. Since

¹ 15 U.S.C. § 77a et seq.

the creation of the Commission post-dated passage of the Act, the Federal Trade Commission was entrusted with the administration of this Act until the companion legislation, the Securities Exchange Act of 1934,² created the SEC. This Act extended the scope of the corporate disclosure principle. Where the Securities Act had focused on initial public offerings of securities, the Exchange Act required continuing and updated disclosure through reports to be filed with the SEC. It also required disclosure in connection with proxy solicitations from shareholders. In general, every shareholder or potential investor thereby was assured access to relevant information to protect himself to the same extent as was the first purchaser of the security.

The original Commission was fortunate to have had appointed exceptionally able members who engaged a staff both dedicated and able. Former commissioners include former Supreme Court Justice William O. Douglas, Judge Jerome N. Frank, James Landis, and Judge Ferdinand Pecorra. They immediately set about enforcing the new Federal securities laws strictly, and they devised measures to make the administrative process effective. Opinion is virtually unanimous that they were largely successful in both respects.

The Commission's responsibilities were enlarged by the Public Utility Holding Company Act of 1935,³ the Investment Company Act of 1940,⁴ and the Investment Advisers Act of 1940.⁵ These added new responsibilities to the SEC's primary efforts. During World War II, its work became less visible. In addition to the much more immediate worldwide problems engaging public attention, the SEC's work grew somewhat more specialized,⁶ and the offices of the Commission were moved from Washington, D.C. to Philadelphia.

After the war, the Commission returned to Washington. During the 1950s, the SEC broadened its protection mission to include sellers as well as buyers,⁷ but no fundamental changes occurred in its duties and operations.

There were, however, significant shifts in the securities business during the 1960s. The markets experienced unprecedented gains in both volume of equities traded daily and their turnover rate (liquidity). The delay by brokerage firms and the New York and American Stock Exchanges in innovating and introducing modern financial and operating practices appropriate to this avalanche of orders led

² 15 U.S.C. § 78a et seq.

³ 15 U.S.C. § 79a et seq.

⁴ 15 U.S.C. § 80a-1 et seq.

⁵ 15 U.S.C. § 80b-1 et seq.

⁶ The Commission describes, in part, its activities during this period as follows:

"The reorganization of the electric and gas industries was a Herculean task in which the Commission faced and solved with a great measure of success:

1. Many complicated problems of industrial structure akin to those that confront the courts in antitrust cases, for the Holding Company Act is in large measure a specialized antitrust statute; and

2. Intricate and novel questions of equity and corporation law engendered by the need to determine who was entitled to what in these holding company breakups."

Response of the Securities and Exchange Commission to Question 1 [to the Subcommittee's June 1975 Questionnaire], p. 43 (July 25, 1975).

"* * * when wartime prosperity and the reviving prospects of once-depressed companies created a new type of investor-victim, viz., the defrauded seller overreached by insider-buyers who knew all about their companies' newly-found riches and much-enhanced prospects. * * *. Using its broad administrative powers to define fraud under that statute, the Commission late in 1942 promulgated its now famous Rule 10b-5 * * * which banned fraudulent, deceptive, and manipulative acts that victimized sellers as well as those that victimized buyers." *Id.* at 43-6.

directly to "... the most prolonged and severe crisis in the securities industry in forty years."⁸ By the time computers were in place, an extended bear market had set in. Brokerage firms, including some major New York Stock Exchange firms, went bankrupt; others were so shaky that the NYSE "suspended" net capital and other rules.

One of the most serious aspects was the so-called Paperwork Crunch, involving daily handling, clearing, and delivery of millions of pieces of paper. It was exacerbated by archaic practices in clearing securities transactions, transferring record ownership, and safeguarding securities and funds. Under the increasing pressure of ballooning trading volume, it was inevitable that these serious flaws would become plainly visible.

In addition to the failure to use advanced technology, the markets experienced a major shift in public investment patterns as institutional investors (*e.g.*, pension funds, bank trust departments, insurance companies, and mutual funds) trading huge blocks of shares became dominant. Various sweetheart, give-ups, and other highly questionable reciprocal commission rate deals offered by brokers to institutions focused attention on brokers' fixed commission rates. These and other problems prompted intensive reviews of the SEC and the securities industry by both Houses of the Congress and the SEC. Four years of legislative study and hearings by the Subcommittee on Commerce and Finance of the House Interstate and Foreign Commerce Committee and by the Subcommittee on Securities of the Senate Banking, Housing, and Urban Affairs Committee culminated in the Securities Acts Amendments of 1975,⁹ a searching and detailed series of amendments to several of the acts administered by the Securities and Exchange Commission but primarily to the Securities Exchange Act of 1934.

One of the primary thrusts of these amendments was to promote more effective competition in the securities markets. The SEC was directed to eliminate anticompetitive rules of the exchanges and the National Association of Securities Dealers (NASD), designated as self-regulatory organizations. The SEC also was directed:

"... having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to use its authority under this title to facilitate the establishment of a national market system for securities. . . ."¹⁰

Whereas the SEC saw its basic function prior to 1975 as securities market regulation, disclosure of corporate financial information, and suppression of fraud, the SEC now must actively assess the economic consequences of the securities market structure and practices, including the use of current technology and the degree of competition;¹¹ after having appraised alternative solutions, it must take a much more affirmative role in implementing remedial action. In addition to its charge to "facilitate the establishment of a national market system," it must review and approve all rules of exchanges (rather than, as

⁸ S.E.C., Letter of Transmittal, *Study of Unsafe and Unsound Practices* (December 28, 1971).

⁹ P.L. 94-29, approved June 4, 1975.

¹⁰ Section 11A(a)(2) of the Securities Exchange Act of 1934 (as added by section 7 of P.L. 94-29), 15 U.S.C. 78k-1.

¹¹ 15 U.S.C. § 78k-1(a).

previously was the case, merely failing to disapprove new rules).¹² Thus, the SEC is to provide leadership in fashioning new trading mechanisms. Whether it can carry out its new responsibilities in the economic sphere as well as it has done in the past with respect to more limited legal regulation remains to be determined.

B. THE SECURITIES AND EXCHANGE COMMISSION AND ITS PUBLIC PROTECTION RESPONSIBILITIES

The Securities Act of 1933¹³ is based on the premise that if the public investor is assured of receiving relevant information about corporations, the securities of which were being publicly offered, he can protect himself and make appropriate investment decisions. The statute requires a corporation to file a registration statement for approval before its securities are offered for public sale. To carry out the Act, Congress granted authority to prescribe accounting standards, principles and practices as well as the form and content of registration statements and other public filings. The Securities Act also makes unlawful, in connection with the offer or sale of any security, fraudulent or deceptive statements or practices, regardless of whether the security is otherwise exempt from the provisions of the Act. Enforcement is supported by civil and criminal penalties for violation of these antifraud provisions, and the SEC is authorized to seek injunctive relief.

Even before enactment of the Securities Act of 1933, however, it was recognized that additional legislation would be needed. Protection of the purchaser through disclosure of information in connection with subsequent sales and resales, i.e., ongoing trading in the securities could not be achieved under the first statute. Congress thus passed the second of the major securities laws, the Securities Exchange Act of 1934.¹⁴

The Exchange Act, in section 4, created the Securities and Exchange Commission, composed of 5 commissioners, appointed by the President and confirmed by the Senate. Section 4 specifies that no more than 3 may be of the same political party, and ". . . in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable." Additionally, the Commission was authorized to "appoint and fix the compensation of" officers, attorneys, accountants and other experts as may be necessary. At the same time, the Exchange Act transferred all functions of the Federal Trade Commission under the Securities Act of 1933 to the SEC.

The Exchange Act also extended the scope of corporate disclosure initiated by the Securities Act. Accordingly, the SEC imposed requirements of continuing disclosure and, as authorized, required periodic reports and disclosure of material events, such as trading by insiders. These provisions, always important, provided the statutory underpinnings for the SEC's voluntary compliance program and en-

¹² Section 19(b) of the Securities Exchange Act of 1934 (as amended by section 16 of P.L. 94-29), 15 U.S.C. 78s(b).

¹³ 15 U.S.C. § 77a et seq.

¹⁴ 15 U.S.C. § 78a et seq.

forcement actions pertaining to illegal and questionable corporate payments. However, these disclosure provisions do not apply to all publicly owned corporations.¹⁵

The Exchange Act provided clear and direct authority for the Commission to regulate the functions and mechanisms for trading securities. It required registration of brokers, dealers, and exchanges; directed the SEC to oversee many of their practices; and imposed sanctions for improper conduct. There was also additional antifraud and manipulation strictures applicable to the various securities markets and additional civil and criminal penalties for violations of the statute or rules issued under it.

In 1935, the Commission's responsibilities were broadened by the Public Utility Holding Company Act,¹⁶ a reaction to the concentration of control by pyramidal holding company structures which had subjected a very substantial portion of the country's publicly owned utilities to a small number of strategically placed operators. The Commission was given broad authority to regulate these holding companies and simplify their structure. The SEC was given no authority with respect to the operations of the utilities, their rates, or the availability of service, responsibilities which at the Federal level fall to the Federal Power Commission. The SEC merely scrutinizes the corporate and financial structure of the holding company, a task outside the jurisdiction of the Federal Power Commission.

The statutory responsibilities of the SEC have been augmented since those early years. For example, under Chapter X of the National Bankruptcy Act of 1938,¹⁷ it advises the court in certain bankruptcy matters, although it has no direct administrative responsibilities. The Trust Indenture Act of 1939 directs the Commission to require disclosure with respect to debt securities. This requirement is analogous to the Securities Act requirement for common stocks and other equities.

The Investment Company Act of 1940¹⁸ may be viewed as a generalization of the congressional concern evidenced in the Holding Company Act. An SEC study of the investment trust industry found that pooled-resource investment companies were being operated in a way which subjected shareholders to enormous risks, while providing large benefits to their managers.¹⁹ Abuses ranged from larceny and embezzlement to misusing investors' funds and self-dealing with (loans to and purchases from, etc.) insiders. It was against this background that the Investment Company Act was passed, requiring registration with the Commission and disclosure to the Commission and stockholders. It made various management practices criminal violations under Federal law and strictly regulated actions by insiders with respect to the activities of investment trusts. Companion legislation, the Investment Advisers Act of 1940,²⁰ provides for registration of professional securities advisors.

¹⁵ Indeed, it is the fact that these disclosure provisions do not reach all corporations doing business abroad which has been cited by the Administration as a reason for additional legislation and another agency to administer the reporting program which would be applicable to companies doing business in foreign countries.

¹⁶ 15 U.S.C. § 79a et seq.

¹⁷ 11 U.S.C. 572, 608, 665.

¹⁸ 15 U.S.C. § 80a-1 et seq.

¹⁹ Securities and Exchange Commission, *Report on Investment Trusts and Investment Companies* (1939-41).

²⁰ 15 U.S.C. § 80b-1 et seq.

An additional piece of legislation which adds to the Commission's statutory base indirectly is the Securities Investor Protection Act of 1970.²¹ The failure of several large and prestigious Wall Street brokerage firms as well as many smaller firms late in the 1960s heightened congressional concern for the safety of customers' funds in the custody of brokers. Spurred by the most prolonged and severe crisis in the securities business in 40 years, the Congress created the Securities Investor Protection Corporation (SIPC) to administer the Act and provide a Federal Deposit Insurance Corporation-like system of underwriting protection for customers against losses of their assets in brokers' hands. The SEC was given responsibility for taking action to protect investors should SIPC, in a particular case, decline to extend its reserves to cover investors' credit with a brokerage firm.

Most recently the panoply of Federal securities laws has been strengthened by the Securities Acts Amendments of 1975 (hereafter referred to as the 1975 Amendments) which significantly amended the Exchange Act by augmenting the Commission's authority and specifically directing it to facilitate the establishment of a national market system and remove anticompetitive exchange rules and other unnecessary regulatory restrictions. The Commission was given authority over many new classes of persons in the securities trading business. The 1975 Amendments strengthened the SEC's regulatory authority over various exchange practices, including statutory support for an administrative decision to deregulate brokers' commission rates and authority to increase the number of seats on an exchange.

The opportunity and the mandate to shape a new national market system is perhaps the most far reaching of the amendments. The present structure of the Nation's securities markets was largely directed by two factors: first, the historical fact of the New York Stock Exchange's early appearance (1792) and (owing to the economics of securities trading) its enormous headstart guaranteed a continuing position of market dominance; second, the fact that the SEC has in general maintained a hands-off approach with respect to the internal organization of exchange functions and the economic structure of the securities marketplaces.²² Now, however, the Securities Acts Amendments of 1975 direct the Commission to play a much more active role in the restructuring operation from which will emerge the national market system. As barriers to competition are removed, the other major force in the restructuring operation is to be the interplay of competitive forces. The situation demands what properly may be called creative regulation: its exercise can no longer be limited to policing an exchange or other self-regulatory organization. The SEC must participate and indeed lead in the building of a new trading system, national in scope, free and open, and protective of the public interest and public investors.

The Nation's securities markets are primarily capital-allocating mechanisms but also are important in raising capital. The function is essential to our economic system, and thus the economic implications of every option warrant thorough economic analysis by the

²¹ 15 U.S.C. § 78aaa et seq.

²² Walter Werner, "Adventure in Social Control of Finance: The National Market System for Securities," 75 *Colum. L. Rev.* 1233, 1260 (1975).

Commission. This is the sort of planning which has been limited in the past at the SEC.²³

III. Case Studies

A. SEC REVIEW OF OFF-BOARD TRADING RULES

The Securities Acts Amendments of 1975 were enacted after exhaustive congressional review of the goals and methods of regulating the securities industry. One of the major thrusts of this legislation, in harmony with a recognized goal of regulatory reform, was to develop markets which are freely competitive while at the same time orderly, open, and protective of the interests of public investors.²⁴

Congress amended the Exchange Act by adding a new section 11A. Subsection (a) sets forth Congress' findings, including that:

(C) It is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure—

- (i) economically efficient execution of securities transactions;
- (ii) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets;
- (iii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities;
- (iv) the practicability of brokers executing investors' orders in the best market; and
- (v) an opportunity, consistent with the provisions of clauses (i) and (iv) of this subparagraph, for investors' orders to be executed without the participation of a dealer.

One means towards this end, endorsed by the 1975 Amendments, is the removal of restrictions which are anticompetitive or which might prevent a national market system from evolving competitively in response to changing market conditions.

This theme appears again and again in the 1975 Amendments. Congress amended section 6 of the Exchange Act,²⁵ for example, which prescribed standards for registration of an exchange as a national securities exchange to require that the Commission, as a prerequisite to registration, affirmatively find that

(5) The rules of the exchange are designed . . . to promote just and equitable principles of trade, . . . to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

(8) The rules of the exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title.

In addition, Congress focused on one class of exchange rules for immediate action. The SEC was charged specifically with the responsibility, under subsection (c) (4) of section 11A,

to review any and all rules of national securities exchanges which limit or condition the ability of members to effect transactions in securities otherwise than

²³ *Id.* at 1254-55.

²⁴ Section 11A(a)(1)(C) of the Securities Exchange Act of 1934, 15 U.S.C. 78k-(a)(1)(C). See the legislative history for a general discussion of this objective: H. Rep. No. 94-123, 94th Cong., 1st Sess. (1975). ("The Committee feels that the provisions of the bill eliminating barriers to competition should well serve the investing public who, after all, are consumers of financial services." *Id.* at 48); S. Rep. No. 94-75, 94th Cong., 1st Sess. (1975) ("The bill approaches the problem of encouraging the development and implementation of a national market system from the point of view of preserving the competing markets for securities that have developed, breaking down all barriers to competition that do not serve a valid regulatory purpose, and encouraging maximum reliance on communication and data processing equipment consistent with justifiable costs." *Id.* at 8.)

²⁵ 15 U.S.C. 78f, as amended by section 4 of the Securities Acts Amendments of 1975, Public Law 94-29.

on such exchanges. On or before the ninetieth day following the day of enactment of the Securities Acts Amendments of 1975 [June 4, 1975], the Commission shall (i) report to the Congress the results of its review, including the effects on competition of such rules, and (ii) commence a proceeding . . . to amend any such rule imposing a burden on competition which does not appear to the Commission to be necessary or appropriate in furtherance of the purposes of this title. The Commission shall conclude any such proceeding within ninety days of the date of publication of notice of its commencement.²⁶

Thus the Commission was expressly directed to report its conclusions to the Congress within 90 days of enactment of that provision and to commence a proceeding (under section 19(c) of the Exchange Act) to "amend" any such rule ". . . imposing a burden on competition which does not appear to the Commission to be necessary or appropriate in furtherance of the purposes of this title."

The rule which was expected to be of primary concern to the Commission in this review was rule 394 of the New York Stock Exchange (NYSE).²⁷ The purpose of the rule is to require NYSE member firms to channel all of their own (principal) orders and their customers' (agency) orders through the NYSE for execution on its floor. Thus, rule 394 serves as a boycott of other non-exchange markets by NYSE members with respect to both principal and agency transactions.²⁸

Under that rule, members of the NYSE could not, except under very limited conditions, execute orders for stocks listed on the NYSE otherwise than on the floor of the NYSE or on a regional exchange.²⁹ Non-exchange transactions in stocks listed on the NYSE could be consummated only after the member wishing to do so had gone through cumbersome and time-consuming procedures. These include bringing back to the floor of the NYSE the quotation from a dealer market maker who is not an exchange member. Dealer market makers who are not exchange members but who trade exchange-listed securities comprise, as a class, the "third market." The member then must afford the specialist (the only individual who can execute transactions in that particular stock on the floor of the NYSE) the opportunity to equal or better the third market maker's quotation. If the latter quotation is still better, then, upon securing permission of a floor governor, the NYSE member could execute the transaction off-board, assuming the previously quoted price is still available.

The legislative history of the 1975 Amendments is replete with specific references to this particular rule and to the fact that each of the congressional committees which studied the securities industry and developed the legislation found that this rule significantly re-

²⁶ 15 U.S.C. 78k-1(c)(4) as added by section 7 of the Securities Acts Amendments of 1975, PL 94-29.

²⁷ H. Rep. No. 94-123, 94th Cong., 1st Sess. 47 (1975).

²⁸ When a member of the NYSE executes a trade on behalf of a customer, he is acting as a broker and the transaction is referred to as an agency transaction. On the other hand, if he trades (either as the buyer or seller) for his own account, he is acting as a dealer and effecting a principal transaction. In an agency transaction, the NYSE member effecting the trade is paid a commission by both the buyer and the seller, for merely matching the two orders; if he acts as principal, he only receives one commission but of course has the opportunity to make a profit on the purchase or sale itself. The NYSE reports that, over 6 years beginning 1970, approximately 380 "specialist" members who execute trades on its floor earned from agency (book) trades about \$366.4 million in commissions. In addition to dealer profits earned from trading for their own accounts. In 1975, dealer profits were \$48.8 million. New York Stock Exchange, "Report of the Committee to Study the Stock Allocation System" (Jan. 27, 1976), p. 100. NYSE, Department of Economics (August 1976).

²⁹ The New York Stock Exchange had attempted to extend the boycott to regional stock exchanges, but the SEC blocked the extension through administrative action in what is known as the *Multiple Trading Case* (In re New York Stock Exchange, 10 SEC 270 (1941)).

stricted brokers from searching out the best price for their customers and impeded competitive market making activities. Since market makers compete by narrowing the spread between the buying and selling price, the advantages which would accrue to the securities markets generally and to public investors individually was a major reason why both Houses of Congress found rule 394 to be inconsistent with the development of the national market system. The House subcommittee concluded that:

[t]he Subcommittee finds that New York Stock Exchange rule 394 is not necessary to make the Exchange Act work. Accordingly, the New York Stock Exchange should immediately rescind the rule. If this is not done, the Subcommittee will introduce legislation which will have the effect of abrogating the rule.³⁰

Similarly, the *Securities Industry Study Report*³¹ conducted by the Senate Subcommittee on Securities, discussed rule 394 specifically and recommended substantial modification (although not outright abrogation) to facilitate trades between NYSE members and the third market while still protecting public limit orders (public orders to buy or sell a certain number of shares at a particular price).

The Committee on Interstate and Foreign Commerce in its report on H.R. 4111 characterized its action to eliminate rule 394 as giving "... life to the proposals contained in the [House] Securities Industry Study Report."³² Although the Senate version did not take the full step of total abrogation, the conferees indicated that they did "... charge the SEC with an explicit and pervasive obligation to eliminate all present and future competitive restraints that could not be justified by the purposes of the Exchange Act."³³ The conference committee generally accepted the Senate provisions but added a requirement for prompt review and amendatory action, if appropriate, of those exchange rules "... which limit or condition the ability of members to effect transactions in securities otherwise than on such exchanges."³⁴ Therefore, for at least the past 5 years off-board trading rules have been viewed as a class of particularly anticompetitive rules, appropriate for special treatment.

In the first report required by the statute, the SEC found unequivocally that the effect of rule 394, and of similar rules which other exchanges have adopted, is anticompetitive. In that report (dated September 2, 1975 and referred to hereafter as the *September Report*), which was addressed to the Speaker of the House and the President of the Senate, the SEC stated:

[t]he Commission has concluded that off-board trading rules of exchanges impose burdens on competition, and the Commission is not now prepared to conclude that these burdens are necessary or appropriate in furtherance of the purposes of the Act.

The Commission added that rather than commence a proceeding for the limited purpose of amending those anticompetitive rules as required by the statute, it had initiated a proceeding to determine: (i) the extent of the anticompetitive effect, (ii) whether there are counter-vailing considerations which argue against abrogation of these off-

³⁰ H. Rep. No. 92-1519, 92d Cong., 2d Sess., XIII (1972).

³¹ S. Doc. No. 93-13, 93d Cong., 1st Sess. 104-5 (1973).

³² H. Rep. No. 94-123, 94th Cong., 1st Sess. 48 (1975).

³³ H. Rep. No. 94-229, 94th Cong., 1st Sess. 94 (1975).

³⁴ *Id.* at 94.

board trading rules, and (iii) whether such rules could be appropriately modified so as to further the purposes of the Act.

According to the statutory timetable, the Commission should have concluded its proceeding to amend those rules within 90 days. By December 1975, those anticompetitive rules which the Commission could not find necessary or appropriate in September were to be amended; also, as the legislative history demonstrates, Congress expected them to be abrogated.

Instead, the Commission, in its *December Report*³⁵ issued at the close of the proceedings, decided with respect to rule 394 to draw a distinction between restrictions imposed on trading for customers (agency transactions) and those for a member's own account (principal transactions). Specifically, all transactions which a member conducts in the capacity of a broker may not be subject to any off-board trading restrictions after January 2, 1977. This provides a year's grace period to allow the self-regulatory organizations and their member firms to make appropriate changes in their manner of doing business. With respect to restrictions on off-board dealer transactions by members, the SEC did not amend the rules, notwithstanding the Commission's conclusion in the *September Report*,³⁶ and its findings in December,³⁷ that the anticompetitive effects of principal restrictions are not necessary or appropriate to the working of the Exchange Act. The Commission merely undertook to re-examine the issues with respect to principal restrictions no later than March 1, 1977. There was no commitment to take amendatory action on that date.

The primary concern asserted by the Commission in connection with abrogation of rule 394 as it applies to agency transactions is the protection of public limit orders—orders to buy or sell when trades reach a stipulated price.

Of all the arguments advanced in favor of retaining some form of off-board trading rule, . . . the most persuasive concerned the desirability of continuing protections for public limit orders . . .³⁸

As a result, the Commission sanctioned a one-year delay in the abrogation of the restrictions applicable to agency transactions because:

[I]t is clear, therefore, that the only fair, realistic, and practicable way of mandating satisfaction of public limit orders . . . is through the creation and development of a composite book and the imposition of a requirement that all transactions, whenever and by whomever effected, must clear that book.³⁹

This delay was permitted despite the Commission's conclusion that public limit orders are not protected now in any absolute sense.

The Commission can perceive little reason why satisfaction of public limit orders should be mandated when an exchange member wishes to effect a transaction

³⁵ Securities Exchange Act of 1934 Release No. 11942, 5-7 (December 19, 1975) (hereinafter cited as *December Report*).

³⁶ *September Report* at 16.

³⁷ "Thus, exchange markets and exchange specialists enjoy, in large part as a consequence of off-board trading rules, important competitive advantages over the third market and over-the-counter market makers, respectively." *December Report*, at 6. The report also details, at pages 5-7, many ways in which brokers and dealers are precluded from taking trading actions which they might wish to take because of these restrictive exchange rules.

³⁸ *December Report* at 43.

³⁹ *Id.* at 44. "Composite book" refers to a mechanism of the national market system as envisioned by the SEC which would aggregate public limit orders, regardless of the market of origin, in one national repository. When the price in any market reached the price specified in the limit order, the public order would be executed automatically, thereby protecting all public limit orders in stocks traded in the national market system.

directly with an over-the-counter market maker, but not mandated when the same member effects the same transaction with the same over-the-counter market maker on a regional exchange. Moreover, even if public limit orders on the "primary" exchange were required to be filled prior to a transaction by a dual member on a regional exchange . . . , opportunities for avoidance would still exist⁴⁰

During the one-year delay, the Commission permits exchanges to require that the specialist's public limit order book be cleared either right before or right after an off-board trade.

The Commission concluded that market making would be improved by abrogating restrictions on off-board principal trading:

Weighing the potential disadvantages to the markets against the potential advantages which the Commission anticipates would result from the elimination of exchange rules preventing or impeding the execution of principal transactions off-board, the Commission presently is of the view that, under appropriate circumstances, increased ability to engage in over-the-counter market making in listed securities by a larger segment of the broker-dealer community (whether by existing exchange members or others), with exposure to order flow, is more likely to improve the securities markets than injure them. In addition, the Commission is convinced that the risks inherent in abrogating exchange restrictions at the present time could be minimized by the prompt achievement of additional elements of a national market system.⁴¹

Instead of immediate abrogation or abrogation effective as of some future date to motivate the affected parties to the "... prompt achievement of additional elements of the national market system", the Commission deferred for more than one year the making of *any* decision with respect to principal restrictions. Thus, at the end of the 180-day starting period, the Commission had accomplished little toward what the statute designated as a high procompetitive priority.

The primary legal question raised by the Commission's handling of this issue is whether it had the statutory authority to delay the effective date of its amendment of exchange rules. Section 11A(c) (4) (A) specifically requires that the Commission conclude its "amending" proceeding within 90 days. One can only infer from the statute's specification of a time limit that Congress expected results in that period; that it did not mean that the Commission could conclude the hearing and defer its decision. The congressional desire for prompt effectuation of the Commission's findings is clearly expressed in section 11A(c) (4) (B), which directs expedited judicial review, should a Commission decision pursuant to subparagraph (A) of that subsection be challenged in the courts. Any interpretation which permits more than minor delays seems inconsistent with the congressional purpose to reform exchange rules. Nothing in the statute or legislative history suggests that a 1-, 2-, or 3-year delay is authorized.

Furthermore, the SEC's judgment in deferring the decision-making process with respect to restrictions on off-board principal trades is questionable. The Commission justified that delay as permitting time for the development of a national limit order book. However, the incentives seem perverse. If the reason that the Commission cannot abrogate the rule now is the absence of the book, then it would seem to be in the best interests of the respective exchanges to do little or nothing to accelerate that development so that the Commission will

⁴⁰ *Id.*

⁴¹ *Id.* at 27.

continue to tolerate off-board trading restrictions. On the other hand, if a date certain for abrogation had been set, it would be to the interest of all concerned to move expeditiously. If the Commission fears that abrogation of principal restrictions would result in self-dealing, it simply could prohibit that form of self-dealing.

Six months after the issuance of the *December Report*, Chairman Hills testified before this Subcommittee that the SEC had received and was reviewing 11 different proposals which have been received for establishing a national limit order book.⁴² Chairman Hills made clear his faith in the NYSE:

There is, in my judgment, a determination in the New York Stock Exchange, for example, to try to create a truly competing specialist system. We will be interested in seeing what their proposals are and how they propose to do it.⁴³

Conclusion

The excessive fact-finding efforts in the proceeding reflected in the *September* and *December Reports* and the deferral of the effective dates of the amendment display timidity and reluctance in contrast to the Commission's vigor in other regulatory matters.

The reports set the stage for outright abrogation of rule 394. The Commission finds the anticompetitive effect described in the statute; it does not find, at least in the *September Report*, that such anticompetitive restrictions are otherwise necessary for statutory purposes. However, a concern for protecting some public limit orders and the need for some exchange members to adjust to trading without anticompetitive advantages afforded by rules like 394 are offered as explanations for not abrogating the rule.⁴⁴ The Subcommittee finds them insufficient given the statute's procompetitive standards.

The episode, above all else, shows a failure by the Commission to carry out the terms of the statute as written by the Congress. It has moved more slowly than the Congress intended. It seems most reluctant to disturb the status quo. It seems to have substituted its own judgment for the basic legislative conclusion. Finding that all the criteria for abrogation were met, it nonetheless concluded that it was not wise to take the action required by the statute. The Commission may certainly come to Congress and request an amendment to the statute. It may not disregard the law.

B. THE SEC AND CORPORATE ACCOUNTABILITY

1. *Public disclosure.*—In responding to the widespread use of basically unsound financing and trading practices characterizing the pre-Great Depression era, Congress provided that reform reach behind fair dealing in securities and public disclosure of financial information. The 1933 and 1934 Acts speak to standards for corporate financial reporting and registration and corporate reporting controls. The SEC

⁴² Subcommittee on Oversight and Investigations, *Regulatory Reform/Oversight Hearings on the Securities & Exchange Commission*, 94th Cong. 2d Sess. at 719 (June 1, 1976) (hereinafter referred to as *Subcommittee Hearings*).

⁴³ *Id.* at 721.

⁴⁴ "The Commission is providing a one-year period prior to eliminating exchange restrictions on over-the-counter agency transactions in the interests of providing time to the exchange community, members of exchanges and the securities industry at large to consider such adjustments in the current ways of doing business and in the existing pattern of regulation as may be deemed appropriate in response to the rule." *December Report*, at 46.

was granted rulemaking authority to assure that public investors would be furnished information necessary for informed investment decisions.

Congress authorized the SEC to require the disclosure of information which is material and necessary or appropriate for the proper protection of investors and to insure fair dealing in the security.⁴⁵ The Supreme Court in *Affiliated Ute Citizens v. United States* speaks of material facts as those which “. . . a reasonable investor might have considered . . . important in the making of this decision.”⁴⁶ Also with respect to the kind of information required to be disclosed, the Congress authorized the SEC to prescribe the form and content of financial reports to be filed with the Commission.⁴⁷

Congress provided further that reports be certified by “an independent public or certified accountant,”⁴⁸ thereby addressing the need that the information be verified. Recognizing that the methods of accounting for information may give misleading results, Congress authorized the SEC to prescribe “. . . the methods to be followed in the preparation of reports.”⁴⁹ With respect to the timeliness of reports, the Congress required each issuer of a security registered with the SEC to file “. . . such information and documents as the Commission shall require to keep reasonably current the information . . .” set forth in filings.⁵⁰

The securities markets rely on the continuing generation and updating of relevant, accurate, and timely information as the basis for informed capital-raising and capital-allocating decisions. The SEC's execution of the disclosure mission is essential both for the proper functioning of the capital markets and the economy as a whole. Disclosure starts from the basic operating unit of the economy, the corporation: provides the body of knowledge describing the operation of that and other units, hence the economy; and yields the factual basis for decisions by a number of economic actors: investors, financial analysts, economists, investment and commercial bankers, competitors, labor, consumers, government policy-makers, public administrators, and regulators. Ultimately, such information helps to form perceptions about the total economic environment. The circle is completed when a corporation's management or board responds to decisions made by outsiders who have acted on its own information. Management also is affected indirectly by individual and collective perceptions as to the state of the economy. It is difficult to overstate the need for relevant, accurate, and timely information about the basic unit of our free enterprise system.

2. *Administration of public disclosure.*—Scandalous episodes of corporate illegality, unaccountability, and use of questionable business practices raise questions about the effectiveness of our system of corporate accountability. Not every corporation has been required to

⁴⁵ Section 10 (b) and (c), Securities Act of 1933 and Sections 12 and 13, Securities Exchange Act of 1934.

⁴⁶ 406 U.S. 128, 153, 154 (1972).

⁴⁷ Section 19(a) and Schedule A, Securities Act of 1933 (15 U.S.C. 77aa), and Section 13, Securities Exchange Act of 1934.

⁴⁸ Schedule A, Securities Act of 1933.

⁴⁹ Section 19(a), Securities Act of 1933, and Section 13(b), Securities Exchange Act of 1934.

⁵⁰ Section 13(a), Securities Exchange Act of 1934.

disclose illegal or questionable business or accounting practices. Most citizens, including the Nation's corporate citizens, are law-abiding.

Nevertheless, more than 200 corporations have disclosed illegal or questionable payments or related activities pursuant to the SEC's voluntary compliance program. An additional 20 have been subjects of formal SEC enforcement actions, and the number of actions brought by the SEC, Justice Department, and Internal Revenue Service continues to grow. Although these cases involve a small percentage of all publicly owned corporations, they frequently are among the world's largest. Of approximately 80 companies which voluntarily disclosed illegal or questionable payments as of May 12, 1976, 62 are among the Nation's 1,000 largest corporations and realized aggregate sales of \$168 billion in 1975.⁵¹ Many disclosed that illegal or questionable payments or practices had persisted for some years. Analysis of public disclosure and the Subcommittee's studies⁵² show that repeatedly one or more of the following key stages in the system of corporate accountability broke down:

- (1) internal corporate conduct and financial controls;
- (2) board of directors;
- (3) independent accountants, auditors, and legal counsel;
- (4) public disclosure of corporate practices and finances; and
- (5) enforcement by the Securities and Exchange Commission.

The following analysis of the SEC's role in the breakdown in the system of corporate accountability and its response to the underlying problems looks first at accounting and auditing and then at disclosure.

(a) *Prescribing accounting standards, principles and practices.*—In exercising its statutory authority to prescribe the methods to be followed in the preparation of accounts, the SEC historically has relied on the standard-setting bodies created by the accounting profession, especially the American Institute of Certified Public Accountants (AICPA).

The results of the Commission's 1938 decision,⁵³ by a 3 to 2 vote, to rely primarily on the private accounting profession to establish accounting principles has been disappointing at best.

In 1940, the Committee on Accounting Procedure (CAP) was established by the AICPA, then known as the American Institute of Accountants. The CAP dealt almost exclusively with the articulation of existing accounting practices and pragmatic solutions to specific accounting problems. Little effort was devoted to the development of a rational conceptual structure.⁵⁴ The AICPA finally reacted to the CAP's failures by creating the Accounting Principles Board (APB) in 1959. The APB folded in the early 1970s, after destroying its credibility as an organization capable of resolving financial reporting controversies. Its failure to set down hard and fast rules about merger accounting until October 1970, after billions of dollars had been accounted for by inadequate and often misleading methods, brought

⁵¹ Fortune Magazine, *The Fortune Double 500 Directory*, 1975.

⁵² Subcommittee Hearings, May-June, 1976, and Subcommittee on Oversight and Investigations Staff Study, *SEC Voluntary Compliance Program on Corporate Disclosure*, (Subcommittee Print, June 1976), (hereinafter referred to as *Subcommittee Staff Study*).

⁵³ SEC, "Administrative Policy on Financial Statements," Accounting Series Release No. 4, April 25, 1938.

⁵⁴ See *The Wheat Committee Report: Establishing Financial Accounting Standards*, Report of the Study on Establishment of Accounting Principles, (New York: AICPA, 1972).

condemnations from public investors, financial analysts, academicians, accountants, and the Congress.⁵⁵

In his analysis of the history of the CAP and the APB, the bodies the SEC depended on for setting accounting principles, Professor Maurice Moonitz, formerly the Director of Research for the APB, wrote:

1. Neither the Committee on Accounting Procedure nor the Accounting Principles Board issued a binding statement of accounting principles in over thirty years of continuous activity in the area.

2. Neither agency adopted a set of terms with related definitions, e.g., "cost," "asset," "revenue." This is not surprising, since usable terminology and related definitions are part of a basic framework of some sort. Useful definitions cannot be framed *in vacuo*.

3. Practice followed APB recommendations closely and quickly with respect to the form of financial reports.

4. APB opinions expressing principles affecting the amount of periodic net income are relatively few. Their quality is spotty. Their impact on practice is uneven.

5. When opinions expressing principles affecting the amount of periodic net income received acceptance in practice, they were preceded by research studies published and widely distributed for an extended period before APB acted.

6. The buffeting the board took in its attempt to resolve difficult issues led it, in later years, to avoid them, and concentrate instead on compiling a record by issuing opinions on less controversial topics.⁵⁶

In the wake of the APB's disintegration, the AICPA created the Financial Accounting Standards Board (FASB). Instead of reacting to the dismal record of the FASB's predecessor boards by reversing its 1938 decision, the SEC continued to recognize the standards, principles, and practices promulgated by the private sector through the FASB in its *Statements and Interpretations* ". . . as having substantial authoritative support, and those contrary to such FASB promulgations will be considered to have no such support."⁵⁷ Dr. Abraham J. Briloff, a CPA, Emanuel Saxe Distinguished Professor of Accountancy at the Baruch College of the City University of New York, and the author of several books on accounting, in his written statement submitted to the Subcommittee, discusses the FASB's performance to date:

I have observed the ways in which it has avoided the critical issues, vacillated on other controversial matters, and handed out special dispensations in order to obtain a consensus for a particular standard. I expected much, much more from a select body endowed with presumptive independence and supposedly possessed of intellectual might, integrity and intrepidity. In short, we have had a surfeit of compromise, of the vulgar pragmatism, of pussy-footing and inching along.⁵⁸

The FASB has accomplished virtually nothing toward resolving fundamental accounting problems plaguing the profession. These include the plethora of optional "generally accepted" accounting principles (GAAPs), the ambiguities inherent in many of those principles, and the manifestations of private accountants' lack of independence

⁵⁵ See: Robert Chatov, *Corporate Financial Reporting* (Macmillan New York, 1975), at 228-29. A. A. Sommer, Jr., "Survey of Accounting Developments in the '60s: What's Ahead in the '70s," *The Business Lawyer* 26 (November 1970), at 207-214.

⁵⁶ Maurice Moonitz, *Obtaining Agreement on Standards in the Accounting Profession*, Studies in Accounting Research No. 8 (Orlando: American Accounting Association, 1974), at 28.

⁵⁷ SEC, "Statement of Policy on the Establishment and Improvement of Accounting Principles and Standards," Accounting Series Release No. 150 (December 20, 1973).

⁵⁸ Abraham J. Briloff, "The Establishment and Implementation of Accounting Standards," *Subcommittee Hearings*, May 21, 1976, at 584 (hereinafter cited as Briloff Statement). See also *Op. Cit.*, Chatov, at 248.

with respect to their corporate clients. Considering the FASB's record, the SEC's continued reliance on the private accounting profession is questionable.

Recent disclosures of illegal and questionable corporate payments show that the protection of investors requires more than uniform accounting principles. Public investors and the public generally need the protections afforded by effective, well-enforced internal corporate controls, responsible corporation directors, and independent auditors.

(b) *Internal controls*.—A system of internal controls enables a corporation to insure that its executives and other employees handle its business and finances in a way that protects shareholders' assets. In addition, an effective system of internal controls is essential to perform a valid independent audit, because the large number of transactions and accounts permit auditors few audit verification techniques other than sampling. Designing and enforcing a system of controls for large, complex corporations is particularly difficult, yet such organizations are most in need of effective internal controls. Information disclosed by lawsuits, pursuant to the SEC's voluntary compliance program,⁵⁰ and by the *Subcommittee Staff Study*⁵¹ document that the inadequacy of internal controls contributed significantly to the incidence of corporate illegality and unaccountability.

(i) *Unaccountability of corporate officers or senior management*

In 36 of the first 89 companies which disclosed to the SEC illegal or questionable payments or practices, "top management" had knowledge of such payments or practices.⁶¹ In addition, the Subcommittee staff studied in detail 25 companies which had discussed disclosure with SEC staff. In 40 percent of these case histories, corporate officers or senior management knew about the payments. Inadequate internal controls permitted lower echelon employees to engage in illegal or dubious business practices and permitted senior managers or corporate officers to be parties to these practices or related activities. In a number of other cases, for example, Gulf Oil, Lockheed, Northrup, and United Brands, the illicit payments were in fact engineered by executives in the top hierarchy of the corporate organization.

(ii) *Ineffective financial controls*

Apart from noting the absence of suitable codes for employee conduct, a significant number of corporations disclosed information which indicates that internal financial controls are ineffective. One of the primary purposes of such controls is to prevent practices such as over-billing or over-invoicing, kicking back the excess to purchasing agents or suppliers, or laundering through off-the-book bank accounts—practices which crop up repeatedly in payoff disclosures.⁶² Other payments or practices which escape internal controls are inaccurate accounting entries, off-the-book funds, and falsification of books and records.

⁵⁰ Securities and Exchange Commission, *Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices*, submitted to the Senate Banking, Housing and Urban Affairs Committee, May 12, 1976 (hereinafter cited as *SEC Report*).

⁶⁰ *Op. cit.*, *Subcommittee Staff Study*, at 5-12.

⁶¹ *SEC Report*, Exhibit A.

⁶² *Op. Cit.*, *Subcommittee Staff Study and SEC Report*.

Of the 25 cases examined in the Subcommittee staff sample, 44 percent of the corporations had recorded payments in accounts which did not reflect the true nature of the payment; 20 percent maintained off-the-book accounts; and 12 percent showed that books and records had been falsified.

The Commission has recommended to the Senate Committee on Banking, Housing and Urban Affairs that legislative remedies embody a prohibition against not only falsifying corporate accounting records but also against corporate officials or agents making false and misleading statements to persons conducting audits of the company's books and records and financial operations.⁶³ In addition, the SEC recommended legislation to require

... management to establish and maintain its own system of internal accounting controls designed to provide reasonable assurances that corporate transactions are executed in accordance with management's general or specific authorization; and that such transactions as are authorized are properly reflected on the corporation's books and records in such a manner as to permit the preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements.⁶⁴

The SEC recommendations, however, stop short of assuring necessary corollary protection: a requirement that independent accountants, who already must test management's system of internal controls for purposes of performing a valid independent audit, attest to the quality of the system of internal controls.

(c) *Board of directors.*—In addition, the SEC has been cognizant of the role of the board of directors in the system of corporate accountability. The board sets corporate policy and oversees management's execution of that policy in administration of the corporation's operations. In some of the illegal and questionable payment cases, significant information necessary for proper oversight had not been submitted to the board. The events disconcerted independent directors who saw nowhere to turn for outside advice and counsel on difficult legal, accounting, and auditing questions. In other cases, directors had knowledge of the payments; in still others, senior corporate officials who had knowledge or approved of the payments were candidates for the board.⁶⁵

In its report to the Senate Banking Committee, the SEC suggested reforming boards of directors of publicly owned corporations: "[a]ction to further enhance the creation by public corporations of audit committees composed of independent directors to work with outside auditors would, however, serve as a valuable adjunct. . ." to the Commission's other legislative proposal to improve corporate accountability via internal controls.⁶⁶ The SEC adds:

Similarly, corporate accountability can be strengthened by making the role of the board of directors more meaningful and separating the critical aspects of the functions of the board and independent counsel.⁶⁷

The Commission has implemented those recommendations to some extent in its enforcement actions. The resolution of those enforcement

⁶³ SEC Report, at 58.

⁶⁴ *Id.*, at 59.

⁶⁵ For example, see *Citiles Service Company*, *Krafco Corp.*, and *Gardner-Denver Co.* sections of *Subcommittee Staff Study* at 7, 9, and 11.

⁶⁶ SEC Report, at 67.

⁶⁷ *Id.*, at 67.

proceedings typically has utilized a temporary committee comprised of independent directors charged with conducting a full investigation with the aid of independent legal counsel and outside auditors to perform the necessary detailed inquiries.⁶⁸ The Commission's one other action on board reform has been to seek the views of the New York Stock Exchange with respect to amending its listing qualifications in accord with the SEC's recommendations.

Limited though its action has been, the SEC does aim to make boards of directors more effective, to establish permanent independent audit committees, and to encourage boards to employ independent counsel. The case histories and the *Subcommittee Staff Study*, however, yield strong evidence that more specific recommendations are in order, if corporation directors are to exercise effective oversight in the system of corporate accountability.

A director must be willing to devote considerable time to his important and continuing responsibilities. A director elected because of demonstrated expertise should be expected to manifest that expertise in fulfillment of his responsibilities and should be compensated appropriately. The majority of the board should be detached from management and from any other conflict of interest, *e.g.*, association with the company's investment banker or corporate counsel. The board should provide itself with independent staff. A board's key audit committee should be comprised of a majority of independent directors who adopt rules to govern the committee's proceedings. The audit committee should have available to it independent expert advisors.⁶⁹ Likewise the nominating committee should be comprised of a majority of independent directors. Assuring the independence of the board and its key auditing and nominating committees as well as holding directors to professional standards of performance are critical to building an effective system of corporate accountability to protect public investors as well as a corporation's customers, suppliers, and competitors.

(d) *Independent auditors.*—In requiring independent accountants to certify financial reports filed with the SEC, the Federal securities laws underscore the crucial function of independent auditors in protecting public investors. The quality of this work and the public's confidence in the certification is rooted in the auditor's independence in appearance as well as in fact. Conversely, the auditor must perform in a manner that warrants confidence.

When asked why many independent accountants did not uncover illegal or questionable payments, inaccurate accounting entries, or falsification of books and records, defenders of the profession point out that the payments were quite small in relation to a corporation's total operations and that sampling, which will miss small items, is the only cost-effective method in auditing large organizations. Moreover, they explain that outside auditors were deluded in a few instances by well-conceived and well-concealed fraud.

⁶⁸ Settlements requiring independent investigatory committees include Gulf Oil Corp., Ashland Oil Corp., General Tire Corp., American Shipbuilding Corp., Lockheed Aircraft Corp., 3M Corp., Northrup Corp., United Brands.

⁶⁹ *The Wall Street Journal* reported on April 21, 1976: "Data compiled by and for the [New York Stock] exchange in internal and outside studies indicate that most of the Big Board's 1,550 listed companies already have a majority of outside directors and independent audit committees." It may be appropriate to limit these requirements to corporations of significant size to minimize financial burdens on small- and medium-sized corporations.

Deficiencies in accounting practices do not appear to be so limited. Testimony before the Subcommittee documented that the standards and procedures supported by the accounting profession's standard-setting bodies and tolerated by the SEC assure less than the requisite independence in the auditors. Dr. Briloff testified:

Miss EMIGH. Dr. Briloff, coming back to the discussion of whether this is a good system of corporate accountability, or are these just unique problems which have arisen because of certain economic conditions or political pressures or something of that nature, I think it is very important that the subcommittee grasp the exact nature of the problem we are facing. Is it a systemic problem, or is it just a unique problem of human frailty that arises from time to time?

* * * * *

Mr. BRILOFF. I would say, Ms. Emigh, that the problem is systemic in the following sense. First of all, it is important for the committee to understand that the present field rules in accounting are that it is not the auditors whose statements are being disseminated and which they are certifying; instead these statements are the statements of management. Therefore, when the auditors say: "these statements present fairly in accordance with generally accepted accounting principles," it does not mean that in the auditor's mind these are necessarily fair statements.

Now it almost sounds like Alice in Wonderland for you to hear it, but it is important for you to recognize this. All it essentially means is that management has, from the book of GAAP, selected a series of alternatives, and then those alternatives that management have selected are presented fairly—very much like the discussion of Lockheed, let us say. So it is systemic to that extent, and in fact in my concluding remarks in the prepared statement I urge that the SEC, if it does nothing else, should do that which Commissioner Sommer and Dr. Burton [Chief Accountant] and others of the Commission have said: "Auditors, when you sign up to that particular certificate, we want you in fact to put your credentials on the line as the independent auditors and to say, all things considered, you in your judgment consider this to be the fairest." It is systemic to that extent.⁷⁰

In 1964, the AICPA appointed the Special Committee on Opinions of the Accounting Principles Board to consider, among other things, the issue of the auditor's assertion of "fairness" with respect to a corporation's financial statement. In support of its recommendation that the APB should set forth its views at the earliest possible time as to the purposes and limitations of published financial statements and of the independent auditor's attest function, the Special Committee asked:

What purposes and limitations attach to financial statements and the auditor's opinion? This question is of first importance to the public and the profession. Literature abounds on it, but the answer is cast in many different molds. Until the profession has an official utterance about it, there is no point in beginning. The Committee believes that such an utterance should be the subsoil on which subsequent pronouncements could be grounded and understood.

* * * * *

Nevertheless, it remains true that until the basic concepts and principles are formulated and promulgated, there is no official bench mark for the premises on which the audit attestation stands. Nor is an enduring base provided by which to judge the reasonableness and consistency of treatment of a particular subject. Instead footing is given to controversy and confusion.⁷¹

* * * * *

... in the standard report of the auditor, he generally says that financial statements "present fairly" in conformity with generally accepted accounting principles—and so on. What does the auditor mean by the quoted words? Is he

⁷⁰ Subcommittee Hearings, May 21, 1976, at 642.

⁷¹ AICPA, *Report of Special Committee on Opinions of the Accounting Principles Board*, (Spring 1965), at 12, 13.

saying: (1) that the statements are fair *and* in accordance with generally accepted accounting principles; or (2) that they are fair *because* they are in accordance with generally accepted accounting principles; or (3) that they are fair only to the extent that generally accepted accounting principles are fair; or (4) that whatever the generally accepted accounting principles may be, the presentation of them is fair?⁷³ (Emphasis in text.)

Not until 10 years later, after many lawsuits and some verdicts against accountants, did the AICPA's Auditing Standards Executive Committee promulgate "Statement on Auditing Standards No. 5, The Meaning of 'Present Fairly' in Conformity With Generally Accepted Accounting Principles in The Independent Auditor's Report."⁷⁴ In paragraph 4, the Committee set forth its interpretation of "fairness":

- (a) the accounting principles selected and applied *have general acceptance* . . . ;
- (b) the . . . *principles are appropriate* in the circumstances . . . ;
- (c) the financial statements, including the related notes, are informative of matters that may affect their use, understanding, and interpretation . . . ;
- (d) the information presented in the financial statements is classified and summarized in a *reasonable manner*, that is, neither too detailed nor too condensed . . . ;
- (e) the financial statements reflect the underlying events and transactions . . . *within a range of acceptable limits*, that is, limits that are reasonable and practicable to attain in financial statements . . .⁷⁵ [emphasis added].

In his statement to the Subcommittee, Dr. Briloff provides a critique of the Auditing Standards Executive Committee's interpretation of "fairness":

Considering the awesomeness of the problem with which it was wrestling, could any set of standards be more pusillanimous than the foregoing? Where do we find a mandate to the auditor to determine and apply the *fairest* of the alternative GAAP's which may be available in the particular circumstances? Where is the auditor exhorted to ferret out those "events and transactions" which might be contrived, designed by management to produce a particular appearance, and to make abundantly clear that these events and transactions are to be given only limited significance by the users of the statements? What, if anything, in these five standards suggests a new, better doctrine? Will the Committee now constitute a new subcommittee to consider how wide is the "range" suggested by criterion (e)?

Granted paragraph 7 does counsel the auditors that "GAAP recognize(s) the importance of recording transactions in accordance with their substance," and that the "auditor should consider whether the substance of transactions differs materially from their form." But even on this self-evident assertion the Committee saw fit to introduce an equivocating footnote directing the reader to Statement on Auditing Standards No. 1, section 110.02 which contains this resounding coda: "The statements remain the representations of management."

Does the Executive Committee expect that the pronouncement will bridge the gap in credibility, and raise the level of confidence in the auditor's output? If it really is of this view, then, as in so many other instances, those who would beguile are the most deceived.⁷⁶

In addition to the deficiencies inherent in the AICPA's "fairness" standard, the Subcommittee's hearing examined the deficiency of auditing standards in reconciling accounts among subsidiaries and be-

⁷³ *Ibid.*, pp. 13-14.

⁷⁴ Now incorporated in *AICPA Professional Standards: Auditing*, Section 411.

⁷⁵ *Ibid.*

⁷⁶ Briloff statement, *Subcommittee Hearings*, May 21, 1976, at 606. See also *United States v. Simon*, 425 F. 2d 796 (2d Cir. 1970), cert. denied Mar. 30, 1970.

tween subsidiaries and the parent corporation. Responding to a question concerning such reconciliation as exemplified by the Gulf Oil Corporation and Equity Funding cases, Dr. Briloff testified as follows:

I cannot, as a matter of professional conscience, see how Price Waterhouse, for example, as the auditors for Gulf Oil Corp., could have avoided the audit for a period of I believe 15 years or so, of this [off-shore] shell corporation where, had they just gone in and even done a superficial review, and related and compared the book entries on that shell corporation with those of the home office which was transferring the funds into this shell corporation, a comparison of one set of entries with the other would have demonstrated the fact that things don't match. And this would have blown the whole plot and the conspiracy sky high.

* * * * *

With respect to Equity Funding, there are some parallels I suppose with what it is that we are talking about [in the Gulf Oil case]. But yet I do believe an invidious distinction must be made. In view of the fact that in Equity Funding the principal auditors there, the Wolf and Weiner group of auditors of Equity Funding, were indicted and then convicted for actual complicity in the fraud, as contrasted with what we have here, and that is a case of benign neglect of what it is that was going on in Gulf Oil, and an invidious distinction must be made.

The conviction of the persons in Equity Funding would indicate that it was certainly far more grievous from the vantage point of the auditors. There is, however, interestingly, one very interesting or significant parallel between the two. As the Trustee's Committee Report in Equity Funding pointed out, if Haskins and Sells, which were the auditors of the life insurance subsidiary of Equity Funding, had taken the effort to compare the entries on the books of that life insurance company with the entries that were made on the books of another subsidiary of Equity Funding—namely, that California sales agent—they would have found there, too, a lack of relationship and a lack of symmetry. So to the extent that there is any parallel, it is there, but we have a different kind of conduct at least as far as the auditors are concerned.

Is there an abuse of power in both instances for different reasons? An abuse of power, the answer is yes. Was there a lack of adequate accountability and advisability as to what management was doing in both instances? The answer is categorically yes.⁷⁶

The SEC has not exercised fully its statutory authority to remedy deficiencies in generally accepted auditing standards.⁷⁷ In this era of complex corporate structures, conglomerates, and multinational corporations, the SEC's reliance on the private accounting profession alone to assure that corporate records are examined by independent auditors has been insufficient to protect public investors and accomplish the objectives of the Federal securities laws.

Dr. Briloff testified that the accounting and auditing flaws revealed by illegal or questionable corporate payments are systemic also with regard to disciplinary actions by the profession and the SEC's enforcement actions:

It is systemic in the respect that there is a dual system of disciplinary procedures that prevails within the leading organization in accountancy, namely in the American Institute of CPAs. To put it very briefly and bluntly, these pro-

⁷⁶ *Subcommittee Hearings*, May 21, 1976, at 651-652.

⁷⁷ Sec. 13 of the Securities Exchange Act of 1934 specifies: "(a) Every issuer of a security registered pursuant to section 12 of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security . . . (2) such annual reports . . . certified if required by the rules and regulations of the Commission by independent public accountants . . . as the Commission may prescribe. (b) The Commission may prescribe . . . the methods to be followed . . . in the preparation of reports, . . . and in the preparation, where the Commission deems it necessary or desirable, of separate and/or consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer . . ."

cedures are consistent with St. Matthew's observation about the blind guys that strain at gnats while swallowing camels.

This is precisely what it is that the Institute does. They will get someone who has bribed a revenue agent, and they should, but when it comes to these causes célèbres that cause this glut in credibility with respect to our private corporate sector to become unstuck the Institute is somewhat oblivious. It is overly sensitive to the feelings on the part of the oligopoly that controls the Institute.

I am sad to say that with some meaningful exceptions I find the same dual system of justice or injustice prevailing in terms of the disciplinary procedures followed by the SEC. While the smaller accounting firms, when the SEC followed the necessary steps, are expelled from practice before the SEC, or suspended for an extended period of time, when it comes to the major accounting firms the SEC might somehow or other get them to enter into a consent decree which to all intents and purposes says that we will not commit adultery in the same place at the same time and the same way with the same consenting party. But change any one of those variables and everything is all right.⁷⁸

In addition to the absence of suitable standards for private accountants and the inadequacies of the profession's and the SEC's disciplinary actions, the accountant's professional responsibilities are particularly confusing because of the decision of the Supreme Court in *Ernst & Ernst v. Hochfelder*.⁷⁹ In its opinion, the Court explained the issue as

... whether an action for civil damages may lie under section 10(b) of the Securities Exchange Act of 1934 ... and Securities and Exchange Commission Rule 10b-5 ... in the absence of an allegation of intent to deceive, manipulate, or defraud on the part of the defendant.⁸⁰

The Court concluded that "... the language of section 10(b) ... clearly connotes intentional misconduct ..."⁸¹ Dissenting, Mr. Justice Blackmun argued that auditors should be held responsible for negligence, particularly because of their critical role in the issuing and trading of securities. He wrote:

The language of the Rule [10b-5] ... seems to me, clearly and succinctly, to prohibit negligent as well as intentional conduct of the kind proscribed, to extend beyond common law fraud, and to apply to negligent omission and commission.^{82, 83}

The implications of *Hochfelder* extend far beyond the accounting profession: "In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel and the crowbar."⁸⁴ Reasonable standards of disclosure must be required of those who represent the public in the provision of corporate information. As Dr. Briloff noted in his testimony, the potential impact of *Hochfelder* is that "... accounting statements would become more precarious and potentially deleterious than they are now."⁸⁵

The *Hochfelder* decision also will make substantially more difficult the private enforcement of the Federal securities laws. The Supreme

⁷⁸ *Hearings*, May 21, 1976, at 653. See also Briloff statement, at 612-613 and 620.

⁷⁹ 423 U.S. 816, 47 L. Ed. 2d 668 (1976).

⁸⁰ *Id.* at 674.

⁸¹ *Id.* at 681.

⁸² *Id.* at 690.

⁸³ Dr. Briloff also is critical of the majority's decision. In his prepared statement, he concluded:

"Nevertheless, the court has decreed that negligence by a professional person is not sufficient to hold him liable to those who were victimized by his negligence even though the person professes competence, expertise and responsibility (and where he is paid on the basis of such professions).

"For me this very pretentious profession is the perpetration of fraud if it is known that negligence is a hidden factor in the profession's tool box." (Briloff Statement, at 616.)

⁸⁴ *United States v. Benjamin*, 328 F.2d 854, 863 (2d Cir. 1964), cer. denied sub nom. *Howard v. United States*, 377 U.S. 953 (1964).

⁸⁵ *Subcommittee Hearings*, May 21, 1976, at 655.

Court held that, under section 10(b) of the Exchange Act, *private* plaintiffs must show "scienter," that is, the "intent to deceive, manipulate, or defraud," before liability can be found. Recognizably, a negligence claim is easier to prosecute than one in which scienter is required. By burdening private parties with the scienter requirement, the decision sharply degrades the discipline provided by an injured private citizen who acts to obtain compensation for financial injury. In order to retain the same level of discipline by proving intent, the enforcement staff of the SEC would have to be grossly enlarged at public expense. Section 10(b) should be amended to establish clear liability for negligence by persons effecting transactions in securities without regard to intent. Of course, the negligence standard implies a failure to meet a standard of care appropriate for the person in question. Thus, the standard that a professional such as a certified public accountant should meet would be expected to be higher than the standard applicable to a person making ordinary transactions in securities.

(e) *Public disclosure of corporate practices and finances—SEC enforcement of Federal disclosure laws in the voluntary compliance program.*—An essential element of corporate accountability is SEC enforcement of the disclosure requirements of the Federal securities laws. In 1974, the SEC began looking into cases of illegal domestic political contributions which had come under scrutiny by the Office of Watergate Special Prosecution Force. Shortly thereafter, the Commission became alerted to reports of foreign payoffs. The Commission and its staff are to be commended for their initiative in undertaking these investigations. In view of the apparent magnitude of domestic and foreign payoff cases, the Commission employed and expanded its voluntary compliance program.

The compliance program is intended to encourage publicly owned corporations under the SEC's jurisdiction to conduct their own investigations of illegal or questionable payments, to disclose findings as well as related improper activities, and to terminate such payments and activities, all on a voluntary basis. Each company is free to proceed on its own reading of the Federal reporting requirements. The informal views of the staff and Commission need not be sought as to whether the information should be disclosed on the form of disclosure.⁸⁶

Directed by Chairman Moss to evaluate the SEC's voluntary compliance program, the Subcommittee staff examined material filed by more than 60 corporations, analyses and recommendations of Commission staff, and the Commission's conclusions. Of the 60 corporation files, 8 are summarized in the *Subcommittee Staff Study* because, in the opinion of the staff, they point to serious shortcomings in the voluntary compliance program.

Although the Commission has obtained some significant results from its voluntary compliance program, the potential charges are very serious. The *SEC Report* notes optimistically that among the 9,000 or so corporations which regularly file documents with the Commission, only about 100 of them have participated in the voluntary compliance program. Since almost all of those companies have voluntarily approached the Commission rather than vice versa, that same observation

⁸⁶ *SEC Report*, p. 12 ff.

could suggest that there may be many other companies which have not come forth. The efficacy of the SEC program, therefore, should be assessed critically at the earliest point.

To this end, the *Subcommittee Staff Study* questions whether the SEC's action was sufficient in eliciting all relevant facts. The staff study concludes:

... more effective enforcement is essential, in part because of the inadequacy of the Commission's enforcement staff to investigate the approximately 100 corporations which have thus far made some disclosure of illegal or questionable payments or the maintenance of false books and records.⁸⁷

During the Subcommittee hearings, the need for follow-up investigations of involuntary disclosures also was evident. In the following colloquy, Dr. Briloff highlights some of the deficiencies in the McCloy report which is the result of the Gulf Oil Corporation's so-called independent investigatory committee.

Mr. BRILOFF. What I see as serious deficiencies and in turn particularly to the accounting implications, I am concerned that the independent auditors that the McCloy committee took on, namely Leidersdorf & Company, that they did not on their own pursue the various accounting practices and try to unearth and to discern the various patterns of illegal payments that they could have pursued. Instead, as I recall the report, they relied essentially on disclosures and leads that had been furnished to them and they then went ahead and did describe of course importantly what was going on in this shell corporation, the Bahamas Ex. Corporation, which was essentially the laundering machinery for these illicit payments.

I am concerned also about the fact that the supposed independent auditors in the McCloy inquiry did not insist upon getting testimony under oath from all those who might have had some knowledge and responsibility for what was going on. As a consequence only this week we hear that somehow some new documents have come into some litigation in Pittsburg which points up the fact that more members of the board of directors of the Gulf Oil Corporation knew a great deal more than they were telling Mr. McCloy that they knew about what it is that was happening and going on.

Also, there is a segment in the McCloy report about the fact that somehow or other some special documents were found in the private files of one of the partners of Price Waterhouse and Company but unfortunately that partner was seriously ill and hospitalized and therefore could not be interviewed by the McCloy committee. All of this indicates the fact that an important effort was made and somehow or other conceivably the pathological review was ostensibly completed but then maybe what we ought to do is according to what the SEC may have felt or the McCloy committee may have felt, maybe if we close it up it will go away and we can go forward.⁸⁸

Without thorough follow-up investigations by the Commission, the public cannot be confident that disclosure has clarified the full nature and extent of illegal and questionable activities. Likewise, the Commission will not know the degree to which Federal disclosure laws and regulations have been violated. Moreover, absent thorough follow-up investigation, the Commission's success in securing cessation and remedial action is doubtful at best.

The *Staff Study* is critical also of the failure to require disclosure in some cases or to permit only generic disclosure in others. For example, the Commission did not require disclosure of \$2.2 million in payments by the Celanese Corporation, although senior management

⁸⁷ *Subcommittee Staff Report*, at 12.

⁸⁸ *Subcommittee Hearings*, May 21, 1976, at 650-651.

knew about the making of a large portion of those payments and although in-house and independent accountants had known for at least 3 years that Celanese's internal auditing controls had broken down. The SEC staff concluded that the payments were material and recommended that the Commission require disclosure quantifying and describing the payments, but the Commission ruled them immaterial. In two cases, Kraftco and Cities Service, the Commission did not require disclosure of the names of corporate officers, some of whom were nominees for board director, who knew about illegal or questionable payments and who knew that internal controls had broken down. In another case, Gardner-Denver, the name of another corporate officer, also a nominee for director, was not required to be disclosed even though he knew of facts indicating an illegal transaction and, therefore, a failure of internal controls at least at the levels of senior management and in-house and independent counsel. It is ironic that the Commission recognizes the need for better internal controls and in fact recommends legislative remedies, yet the Commission has ruled that where the system of internal controls has been inoperative and where corporate officers or managers, some of whom were nominees for director, knew that necessary safeguards were not functioning, shareholders should not be so informed before electing the directors or giving proxies.

Despite some shortcomings, the SEC and its staff have taken important, often courageous action in attempting to determine the scope of illegal, unethical corporate actions and to devise remedies. Nevertheless, the need to strengthen the SEC's compliance program is imperative considering the pervasive influence exerted by management of publicly owned corporations, the deficiencies evidenced by some elements of the accounting profession, and the importance of public confidence in the economic system and the integrity of the political process.

C. WHITE HOUSE PERSONNEL PRACTICES AT THE SEC

The White House has played a major role in the referral and clearance of applicants for positions at regulatory agencies, positions that are for the most part outside the competitive civil service system. Because the public needs and expects its regulatory commissions to decide difficult social and economic issues, without regard to partisan politics or selfish privilege, the Subcommittee has examined in depth the recent activities of the White House and the effect of White House personnel policies on the SEC as an independent regulatory agency.

Section 4(a) of the Securities Exchange Act of 1934 authorized the creation of the Commission with five commissioners and further provided that:

not more than three of such Commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable.⁸⁹

Thus, the Congress established a bipartisan independent regulatory commission rather than an Executive Branch bureau which would bear the traditional and direct relation to the President and his Executive Office.

⁸⁹ 15 U.S.C. 78d.

Notwithstanding its independent nature, staff appointments within the Securities and Exchange Commission generally follow the same rules and are subject to the same criteria as are appointments to comparable positions within the Executive Branch.⁹⁰

Several classes of these positions within the Federal establishment generally, including the SEC, are not part of the competitive civil service.⁹¹ For these posts, there need be no competitive examinations. The political affiliations of the candidate for certain of these positions are a required criterion; *e.g.* the position of Commissioner, as directed by section 4 of the Securities Exchange Act. Below that level, several other personnel classifications also are exempt from competitive examination.

The Civil Service Commission has by rule⁹² established three schedules or classes of appointments outside the competitive service. In general, these classifications are summarized as follows:

(1) Schedule A—positions for which examination is not practicable (staff attorney positions throughout the government are included under this heading);

(2) Schedule B—certain additional positions for which competitive examination is not possible (not significant with respect to the SEC); and

(3) Schedule C—“positions of a confidential or policy-determining character . . .”⁹³ at the GS-15 or lower level.

Schedule C positions permit a political appointee to have his own private secretary or personal adviser who is outside of the competitive structure of the civil service laws. These positions are classified as Schedule C only through GS-15. Positions with the potential for salaries above GS-15 are classified within what is called the “executive assignment system” with certain limited and specified exceptions.⁹⁴

When an agency desires to have a supergrade position filled other than by competition, presumably because the position directly affects policy or politically-sensitive decisions or advice, it must have the position classified as a non-career executive assignment (NEA), for which Civil Service approval is required.

The Civil Service Rules specify the criteria which a position must satisfy in order that CSC will classify it as NEA.⁹⁵ The Commission must determine that:

there is a need for filling the position by a person who will:

(1) be deeply involved in the advocacy of Administration programs and support of their controversial aspects;

(2) participate significantly in the determination of major political policies of the Administration; or

⁹⁰ The Subcommittee recognizes that the situation which is found to obtain in the SEC in regard to White House Personnel Office presence is not necessarily different from that at any of the other regulatory commissions.

⁹¹ 5 U.S.C. 2102 and 2103 provide that all positions in the Executive Branch are within the competitive service unless exempted expressly. The independent regulatory commissions, including the SEC, have always been treated as subject to these provisions of the U.S. Code.

⁹² Exceptions from the Competitive Service (Rule VI), Civil Service Rules, 5 C.F.R. § 6.1 ff.

⁹³ 5 C.F.R. § 6.2 (Schedule C).

⁹⁴ 5 C.F.R. 305.102.

⁹⁵ 5 C.F.R. § 9.1 et seq.

(3) serve principally as personal assistant to or adviser of a Presidential appointee or other key political figure.

* * * * *

(c) The Commission shall not except a position which has as its principal responsibility the internal management of an agency, or a position involving longstanding recognized professional duties and responsibilities resting on a body of knowledge essentially politically neutral in nature. . . .

Through the use of positions established in Schedule C and through categorization of a limited number of positions as NEAs within the staff of an independent regulatory commission, there is the potential for a significant presence to develop which is not only politically partisan but also which in order to fill positions appropriately categorized as Schedule C or NEA must have previously established political loyalties. The Securities and Exchange Commission reports having five positions classified as NEA: the General Counsel, the Chief Accountant, the Executive Director, the Director of Economic and Policy Research, and the Executive Assistant to the Chairman.

Given this structure of positions and the possibility of filling certain of them from outside the competitive civil service system, an incumbent Administration would be attracted by such opportunities to place its spokesmen in controlling positions in agencies which the Congress intended to be independent of the Presidency. The Subcommittee staff, therefore, requested information from the SEC in order to determine what had been the agency's experience with White House preferences and to evaluate how well it had been able to maintain its independence from White House influence on personnel.⁹⁶

The White House activity reported by the SEC falls into two broad categories: (1) referrals to the SEC of individuals seeking employment, and (2) clearance of individuals selected by the SEC for NEA or Schedule C positions prior to their appointments.

Referrals.—The SEC disclosed an active policy of referral of candidates for employment by the White House. For example, during the calendar years 1969 and 1970, 60 such referrals on record were submitted, usually with a form memorandum of transmittal. Of these 60, the SEC reports having hired only three, of whom two were not employed until 4 and 5 years respectively after the date of the White House referral.

Shortly before July 1971, the White House took steps to formalize its personnel program, including referrals to the Federal departments and agencies.

To this end, in March 1971, it circulated to the many units of the Federal establishment a handbook⁹⁷ marked "Administratively Confidential." The introduction states: "[t]he purpose of this handbook is to outline the procedures for the Department (*sic*) and Agencies to cooperate with the White House in the management of non-career personnel." It contained chapters dealing with "recruiting, clearance, personnel administration, handling unsolicited applications and part-time positions." The new personnel program clearly prescribed procedures

⁹⁶ Similar information was requested from each agency studied in this report. The other agencies were apparently not as frank as the SEC or had less complete records, since the eight other agencies together only reported a total of 86 referrals from the White House Personnel Office over the period from 1969 through June 1976.

⁹⁷ The White House Personnel Office handbook dated Mar. 17, 1971, does not appear to have had any formal title. It seems to have been merely a mimeographed set of instructions to the agencies and departments.

for White House referrals to the agencies, including the use of a new form. With that form the White House could indicate whether the candidate was being referred on a "must", "high priority", "courtesy", or "routine" basis.⁹⁸ The SEC indicated that a résumé of the candidate's qualifications usually accompanied each referral. The prescribed procedure included a standard method for informing the White House what action followed the referral.

From July 1971 until December 1975, the SEC records show 115 referrals under this procedure. The referral forms, copies of which were furnished to the Subcommittee, frequently included comments giving instructions for special handling ("Interview immediately re a part time position in Philadelphia"),⁹⁹ for supplying additional information about the candidate's credentials ("Please interview for staff attorney, _____ was extremely hard working campaign volunteer who worked for _____ who could certain (sic) speak for his abilities"),¹⁰⁰ or for advising the agency about any flexibility which might be available to it in dealing with that particular candidate ("_____ has a must rating from the Inaugural Committee but is not necessarily an SEC must."),¹⁰¹ In other cases, the transmittal was made by memorandum rather than by the routine form. One such 1970 memorandum which found its way into the SEC's files stated: "He [the candidate] is the son of _____ who is a member of the Onondaga County Legislature in New York. I have known _____ for a good many years, and if the son is anything like his father, he would make a good addition to the Administration."¹⁰²

The record shows a continual flow of such referrals from the White House with indications for the agency's guidance of how seriously it was to take the referral and, in some cases, of the disposition it was expected to make. The SEC reports that of the 115 referrals which were made by the White House Personnel Office over the 4½ year period beginning July 1, 1971, only 6 individuals were employed. In view of the circumstances, the agency displayed remarkable fortitude. The potential for serious abuse of the regulatory process nevertheless remains a threat.

During this same period, as a part of the new White House personnel program, the SEC was required to report periodically to the White House on positions, incumbents, vacancies, and prospective vacancies. For non-career supergrade positions, reports were required weekly. On a monthly basis, the SEC reported

*** on the number of non-career positions available, intended for replacement, or in White House clearance.¹⁰³ In addition, the form asked for specific information, including political affiliation, on persons occupying noncareer positions at GS-16, GS-17, and GS-18 levels.¹⁰⁴

A nine page report was required monthly on personnel-related matters, including disposition of White House referrals. Other reports,

⁹⁸ Subcommittee Hearings at 729.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 731.

¹⁰¹ *Id.* at 732.

¹⁰² *Id.* at 739.

¹⁰³ The White House involvement in the clearance process will be discussed separately below.

¹⁰⁴ Revised (combined) response of the SEC to Questions 67, 68, and 69 of the Subcommittee's Questionnaire.

required monthly, provided information on Schedule A attorney positions, including full-time positions and upcoming vacancies.

The White House Personnel Office at this time closely monitored the availability of non-competitive positions throughout the Federal government and sent a stream of referrals with appropriate instructions to departments and independent regulatory commissions alike.

Clearance.—The White House handbook also specified its role in the clearance of non-career appointments, both those in the executive departments and those in independent regulatory agencies such as the SEC. The handbook advised that it

* * * has the responsibility for clearance contacts on full-time Presidential and Executive level positions. * * * For non-career supergrade, Schedule C/GS-15 and below, and Schedule A Attorney/Advisor positions, the Departments should make the formal clearance contacts [presumably political clearance, although the Handbook is not clear on this point] and submit a completed clearance contact sheet (Exhibit 212b)¹⁰⁵ along with a biographic data sheet (Exhibit 212a)¹⁰⁶ to the White House Personnel Office for approval. . . . Also, submittals for candidates who are not Republicans should be accompanied by a brief written justification for the appointment. * * *

White House clearance of non-career positions, including the executive assignments and those covered by Schedule C, appears to be an accepted practice under all administrations. Chairman Moss first corresponded with Chairman Hampton of the Civil Service Commission on this issue three years ago. At that time, Chairman Hampton stated that (1) the Civil Service Commission took no part in the process of appointing individuals to positions classified in Schedule C, as the appointing authority in such cases is with the agency, and (2) the Commission does review, as it is required by statute,¹⁰⁶ the qualifications of candidates for appointment to NEA positions after being advised that agency and White House officials have found the candidate to be suitable. Further, Chairman Hampton stressed that he considered this arrangement to be appropriate, since in its operation it serves the purpose of keeping separate and distinct the competitive and the non-competitive services, thereby strengthening the former.¹⁰⁷

Following the Subcommittee's hearings on June 1, 1976, Chairman Moss wrote again to the Civil Service Commission, particularly to learn the authority for the requirement for White House clearance of NEA appointments and more generally to see whether there had been any change, with the passage of time, in Chairman Hampton's views of the propriety of the White House personnel practices.

The Civil Service Commission reply¹⁰⁸ made clear that the requirement for White House clearance does not come from the Commission. Chairman Hampton further stated:

I remain of the opinion that it is proper for the Administration to determine the supportiveness of appointees to positions that are appropriately NEA. If such is not the case, I see no reason for such clearance. I believe, too, that any agency that wants its key positions to not have an NEA type of relationship to the Administration should fill its positions by career appointments.

¹⁰⁵ References to Exhibits are to forms included in the White House Issued Handbook.
¹⁰⁶ 5 U.S.C. 3324.

¹⁰⁷ Letter, Robert E. Hampton, Chairman, Civil Service Commission to John E. Moss, Chairman, Subcommittee on Commerce and Finance, House Committee on Interstate and Foreign Commerce, dated Aug. 16, 1973 (See *Subcommittee Hearings*, at 761.)

¹⁰⁸ Letter of Chairman Hampton to Chairman Moss, dated June 25, 1976. *Subcommittee Hearings*, at 762.

The distinctions between a Cabinet level department and an independent regulatory commission are not ours to make. The laws and Executive orders under which we must currently operate make no general distinctions. However, I note that several pieces of legislation recently have been proposed, and one affecting the Consumer Product Safety Commission has been enacted, which do relate to the types of appointments appropriate in independent regulatory agencies. The legislative approach seems to me to be the best answer to this question.

The SEC experience, therefore, may be viewed as presenting, in a microcosmic sense, a picture of the relationship between an incumbent Administration and an independent regulatory commission. There is apparently no distinction evident to the Executive Branch between the agency which reports directly to the White House and the independent regulatory commission. Least of all does that distinction appear to Chairman Hampton insofar as the matter of clearance is concerned.

In the Subcommittee's view, the proper question is not whether the White House should clear (or decline to clear) appointments to positions classified as NEA within an independent regulatory commission. If we assume that the incumbent of a position will be called upon to make or defend Administration policy, then it may be appropriate to have Administration clearance. The real issue is whether any position in an independent regulatory commission should be classified as NEA. The Civil Service Commission Rules described above set out the characteristics of a position in order that it may be classified as NEA. However, a review of these characteristics finds them peculiarly inapplicable to positions in an independent regulatory commission such as the SEC having bipartisan membership and a need for impartial rulemaking and adjudicating. Partisan politics in the SEC are entirely out of place.

The ongoing practice of referrals from the White House for employment in the SEC is, of course, a by-product of the Civil Service Commission's acquiescence. If such positions within the SEC did not exist, the referrals of individuals who do not meet objective, reasonable criteria could be expected in large part to cease.¹⁶⁹ In any event, it would certainly be much easier for an agency to ward off such referrals if the rules governing entrance and appointment to the competitive service could be invoked. Even if the spirit and sense of mission of the SEC and its career staff is strong enough to absorb a certain number of politically oriented appointments below the Commissioner level, the constant reaching out by the White House to an independent regulatory commission, and especially to agencies with consequential missions such as the SEC, can hardly be healthy. Under continuing pressure of referrals, it is possible for an agency to become a dumping ground for individuals with none but political qualifications. Further, such practice could thwart, in whole or in part, the congressional purpose underlying its insistence on a balanced, bipartisan commission. If key members of the senior staff upon whom Commissioners rely for advice can be the product of White House placement or approval, it is less than realistic for the Congress or the public to expect independent, bipartisan decisions on critical regulatory issues.

¹⁶⁹ It should be noted that the White House confidential handbook, by its own terms, is only applicable to "non-career personnel." It does not apply to positions within the competitive service.

IV. Securities and Exchange Commission Resources

A. INCREASING MAGNITUDE OF SEC RESPONSIBILITIES

In June 1972, the Advisory Committee on Enforcement Policies and Practices issued its report to the Securities and Exchange Commission recommending that "[t]he Commission should establish a goal of doubling the size of its total staff over the next five years."¹¹⁰ In support of a 20 percent annual growth rate over the succeeding 5 years, the Advisory Committee estimated the demands that would be placed on the SEC during the 1973-1977 period. One indication was provided by a comparison of the size of the Commission's staff and its responsibilities in June 1941 with its size and responsibilities in June 1971. The Committee's findings are summarized in the following table:

SEC staff and responsibilities: 1941-1971

	Percent change
SEC staff positions-----	-18
Exchange trading:	
Shares traded (in billions of shares)-----	+1,769
Dollar volume-----	+2,490
1933 Act registration statements-----	+855
Reports under 1934 Act:	
Reporting companies-----	+307
Reports filed-----	+557
Registered investment companies-----	+211
Assets of registered investment companies-----	+3,024
Investment Company Act of 1940:	
Reports filed-----	+533
Applications for exemption-----	+150

Source: Derived from SEC, *Report of the Advisory Committee on Enforcement Policies and Practices*, June 1, 1972, at 64a-64e.

The Advisory Committee also noted:

The expanding workload in recent years in virtually every area of the Commission's activities should have been met by the employment of additional personnel to review and comment on required filings, inspect broker-dealers, investment companies and investment advisors, develop improved coordination with self-regulatory organizations and process the flow of routine applications.

* * * * *

The burden has not been any less in the area of formal enforcement. . . . In the Committee's view, these enforcement activities [attacking the proliferation of 'shell' companies, improper use of inside information, improper use of customers' funds and securities by brokers, infiltration of organized crime into the securities industry, unlawful corporate take-overs, misuse of pension fund assets and manipulative securities promotions on a national and international scale] are indispensable to an effective program of securities industry regulation and should be expanded and made more effective.¹¹¹

In addition to the workload expansion which the Advisory Committee projected, the demands on the SEC have been increased dramatically by the major new responsibilities imposed by the Securities Acts Amendments of 1975, the advent of call options exchange markets and sharply accelerating call options trading volume, and the

¹¹⁰ SEC, *Report of the Advisory Committee on Enforcement Policies and Practices*, June 1, 1972, at viii. The Advisory Committee members were: John A. Wells, Chairman, Manuel F. Cohen, and Ralph H. Demmler.

¹¹¹ *Ibid.*, at 65-66.

informal and formal enforcement actions necessitated by such events as the continuing illegal and questionable payments disclosures.

Some of the new duties set forth in the 1975 Amendments are one time only; *e.g.*, the section 31 review of exchange and NASD rules to assure conformity with the Exchange Act as amended. In 2 instances, the Commission dealt with its understaffing problems by requesting Congress to postpone the due date of the reports on the bank and the street name studies 6 months. Other tasks are of a continuing nature; *e.g.*, the section 19 requirement to approve or disapprove all proposed rules of the exchanges and the NASD. Many of the new statutory responsibilities involve processing documents and data subject to deadlines.

In informal enforcement activities, the Division of Corporation Finance has had to review disclosure filings of more than 200 companies in its voluntary compliance program. The review usually includes several sessions with representatives of the corporation seeking to discuss whether disclosure of certain payments and practices is necessary and, if so, the extent of disclosure required. The Corporation Finance and Enforcement Divisions' staffs in many cases draft recommendations to the Commission for resolution of disclosure issues. In formal enforcement proceedings, the Division of Enforcement has brought to date around 20 actions pertaining to unexpected illegal and questionable payment cases, in addition to its familiar workload.

B. SEC BUDGET: 1973-1977

In contrast to the anticipated 100% increase in permanent staff positions for the 5-year period from 1973 to 1977, such positions actually increased only 23% from 1973 to 1975, and they are estimated to increase at a far lesser rate, 7%, in 1976 and 1977. If FY 1977 budget amounts as reduced and approved by OMB are appropriated, the staff will have increased by only 32% in the 5-year period, despite a total workload which far exceeds what the Advisory Committee in 1972 predicted for the 1973-1977 period.

As might be expected, total budgeted amounts also fell below the Advisory Committee's target growth rate. In constant dollars (adjusted for inflation), the SEC's budget grew only 22% between 1973 and 1975. On a straight-line basis, that is comparable to a 7.3% per year growth rate, in contrast to the 20% per year goal. Using the 1977 budget estimate, the total budget in current dollars will increase 19% for the 1976-1977 period. Assuming that the rate of increase of inflation stabilizes at the Administration's 6% per year projection through 1977, the annual rate of increase in real terms for each of the two years would be 3.5%. At a 7% per year inflation rate, the annual rate of increase would be only 2.5%.

The annual rates of growth in permanent staff positions and total budget indicate that the SEC did better in the 1973-1975 period than it will in 1976 and 1977. Indeed, with respect to the FY 1975 budget, the Subcommittee Chairman made the following statement at the Subcommittee's hearings:

Mr. Moss. At the time of the chairmanship of former Chairman Bill Casey and former Chairman Ray Garrett, Congressman Broyhill, who was at that time the

ranking minority member on the [legislative] Commerce Subcommittee, joined me in appearing before the Appropriations Committees of the House and Senate to urge an increase in the budget and in the staff levels at the SEC.¹¹²

The House legislative subcommittee's position has been consistently to increase the SEC's budget. The Congress on several occasions in the past 3 fiscal years has increased the amount of the SEC's budget over what had been requested on its behalf by the OMB.

In light of the Commission's major new responsibilities at the time of writing what became the 1975 Securities Acts Amendments, the House legislative subcommittee consulted with the SEC to determine the amount needed to be authorized. The Congress' final authorization of \$51 million for FY 1976 and \$55 million for 1977 was understood to reflect the SEC's best estimate of what would be needed to implement its new responsibilities. Yet for FY 1976, the Commission secured only \$49.3 million, \$1.7 million less than what it estimated it would need. For FY 1977, the OMB already has cut a little over \$3 million.

Of particular concern to the Subcommittee in this regard is the way in which the Commission has secured additional staff for FY 1977. After the OMB rejected a supplemental request for an additional 132 staff positions, the Commission countered with a request for 57 new positions. In a letter to OMB Director James Lynn, SEC Chairman Hills pointed out that 35 staff were transferred from the Division of Corporation Finance "... to other programs relating to our new legislation, despite a projected increase in registration statements"¹¹³ and despite the continuing voluntary compliance program responsibilities. Chairman Hills "... offered ... a commitment to reduce the 1978 personnel level of the Commission to the level of 1976 or below, in exchange for temporary increases in personnel."¹¹⁴ In the same letter, Chairman Hills stated that the Division of Enforcement is "... facing at least a temporary increase in investigation pressures", apparently in reference to illegal corporate payment cases. He also stated that the Commission has

[a]ttempted to fund (with ever-increasing difficulty) certain mandatory increases within our existing appropriation, e.g., postal rates, health benefits, reimbursement of travel costs for members of the National Market Advisory Board, and other such built-in escalating costs.¹¹⁵

Despite his recognition of increases in statutory duties, registration burdens, and enforcement activities, Chairman Hills reiterated the SEC's commitment, "... subject to authorization of a temporary personnel increase, to a minimum of 10 percent reduction in personnel for support services."¹¹⁶

During discussion at the Subcommittee hearings of this commitment to reduce 1978 staff levels to those of 1976, Mr. Hills first explained:

[i]t is something no different from any projection, a target we are shooting for. But given the present understanding of what we can do to improve our own internal systems, I think it is a reasonable target to shoot for.¹¹⁷

¹¹² *Subcommittee Hearings*, June 1, 1976, at 711. For further data on OMB's actions with respect to the Commission's budget and manpower requests for the 1971-76 period, see Appendix A-4. OMB has consistently ordered significant cuts in the Commission's requests.

¹¹³ Roderick M. Hills, letter to OMB Director James T. Lynn, Dec. 4, 1975, at 2.

¹¹⁴ *Ibid.*, at 1.

¹¹⁵ *Ibid.*, at 2.

¹¹⁶ *Ibid.*, at 3.

¹¹⁷ *Subcommittee Hearings*, June 1, 1976, at 706.

Later, during the same hearing Chairman Moss asked: "Now do I understand that the present levels of staffing and budgeting are, in your judgment, Chairman Hills, adequate?" Mr. Hills responded:

Given our present look at the things we can do to improve our capacities in terms of modernization, that recordkeeping and what-have-you, it is our best judgment we will have sufficient staff to do the job in the long run.

There are a couple of big "ifs" in that. If our basic form revision works so that the handling of information and filings in Corporate Finance can be facilitated when we have again a large bulge in the corporate registration statements, which we see coming, we will be able to do that job with fewer people. I am anticipating—it may be we can't improve our methods that much. . . . [The SEC budget] is the kind I would like anybody working for me to have, recognizing we are cutting very close and may have to come back to Congress.¹¹⁸

The Commission is to be complimented for its efforts to increase its productivity and efficiency. Nevertheless, the Subcommittee is concerned that the Commission's commitment to reduce the FY 1978 staff level to that of FY 1976 will compound the difficulties arising from the backlog of badly needed but unfilled positions. The failure to achieve the targeted increases in staff during the 1973-77 period must be contrasted with the dramatic increase in responsibilities which are in addition to those anticipated in 1972. Moreover, it is unwarranted to assume that a 1978 staff reduced to the 1976 level can keep pace with its increasing responsibilities to assure public investors that the expanding markets are orderly and operate in the public interest.

V. *Conclusions and Recommendations*

A. OFF-BOARD TRADING

With respect to its statutory mandate to review off-board trading rules and abrogate those which are found to be anticompetitive and otherwise unjustifiable, the SEC should act promptly to carry out the clear letter of the law. The subject matter at issue is of particular importance to regulatory reform since abrogation of these exchange rules would remove anticompetitive regulatory restrictions. Where, as is the case here, over-regulation (by the exchanges, with the acquiescence of the SEC) stifles competition and interferes with free market forces, it should be withdrawn. In the present situation, the Congress has made that judgment, absent a finding by the SEC that there are countervailing justifications necessary to carry out the objectives of the Securities Exchange Act of 1934. The SEC should act promptly to enforce the law.

B. CORPORATE ACCOUNTABILITY

With respect to its role in assuring an adequate system of corporate accountability, the SEC should take the following steps:

1. *Accounting standards, principles, and practices.*—Independent accountants and auditors should become neutral corporate financial reporters. Thus, to the maximum extent practicable, the SEC should prescribe by rule a framework of uniform accounting principles. In instances where uniformity is not practicable, the SEC should require the independent auditor to attest that the accounting principles se-

¹¹⁸ *Ibid.*, at 711.

lected by management represent financial data most fairly. He should also prescribe supplemental data to permit a translation from one set of assumptions to another, thereby permitting comparability among companies in a particular industry.

2. *Internal controls.*—The SEC should act promptly to promulgate rules necessary to assure that:

(a) publicly owned corporations adopt and enforce codes of business conduct that conform to the laws of all countries in which a corporation operates and that are disclosed publicly to shareholders through filings with the SEC;

(b) procedures which allow corporations to develop off-the-book accounts are eliminated;

(c) uniform financial controls are applied throughout every department and operating division of the consolidated corporation and complementary accounts among subsidiaries and between subsidiaries and the parent are reconciled regularly;

(d) communication is strengthened among in-house accountants and auditors and the appropriate levels of management;

(e) falsification of books and records is penalized;

(f) a certified public accountant who falsifies or contributes to the falsification of books and records will be suspended from practicing before the SEC; and

(g) independent auditors attest to the quality of internal controls and the quality of enforcement of those controls in the annual report.

3. *Boards of directors.*—The SEC should promulgate rules necessary to assure that:

(a) a director of a publicly owned corporation receives compensation and independent staff sufficient to perform responsibly his board duties;

(b) a majority of the board is independent of senior management and operating executives and from any other conflicts of interest.

(c) the board reviews and approves the corporation's code of business conduct and system of internal controls;

(d) the board's auditing and nominating committees are comprised of a majority of independent directors;

(e) the board's auditing committee has available to it independent expert advisors; and

(f) the board has the authority to hire and fire the independent accountant, legal counsel, the general counsel, and senior operating executives.

4. *Auditing standards.*—(a) The SEC should prescribe by rule auditing standards to be followed by independent accountants who certify financial reports filed with the SEC.

(b) The SEC should prescribe by rule standards of conduct for independent accountants and auditors and for accounting firms practicing before the Commission and should take disciplinary action as may be necessary to assure adherence to such standards.

(c) Legislation amending section 10(b) of the Securities and Exchange Act of 1934 is needed to protect the public against negligence by accountants and others, regardless of intent to deceive or defraud.

5. *SEC enforcement of Federal disclosure laws.*—(a) To assure that SEC action is sufficient to elicit all relevant facts and to ascertain

the frequency and extent of violations of Federal laws the SEC should:

(i) confirm its authority to pursue all such investigations and to examine the accuracy of voluntary disclosures through access to corporate books and records in a consent judgment filed in a Federal court and thereby enforceable, if necessary, by contempt of court sanctions;

(ii) verify through its Division of Enforcement or by other means, the accuracy of all published corporate disclosures and publish the results of its follow-up investigations; and

(iii) seek through supplementary appropriations funding sufficient to augment its enforcement staff for the purpose of such follow-up investigations and for new investigations.

(b) The SEC should refer to the Department of Justice cases where senior management or the corporation's independent accountants or auditors had knowledge of or participated in illegal payments or any substantial payments which were not truthfully disclosed in corporate books or records. Injunctive relief, while important, is not a sufficient deterrent in such circumstances.

(c) To inform the public of the nature and extent of illegal and questionable activities in which corporations may be engaged,

(i) more detailed public disclosure is necessary as to all companies which have maintained false or inaccurate books or records or which have engaged in any illegal payment (under the laws of the United States or any other country), any substantial questionable payments, or any form of domestic or foreign political contribution;

(ii) disclosure must include at a minimum a detailed description of the nature and purpose of the payment, the amount, the basis of its illegality (or the surrounding facts which make it questionable), and the identity of all corporate officials who participated or had knowledge of the payment;

(iii) disclosure must tell how much corporate employees and particularly senior management and directors knew about all illegal or questionable corporate payments; and

(iv) disclosure always should be in appropriate communications to the shareholders and to the media.

C. WHITE HOUSE PERSONNEL PRACTICES

With respect to intervention by the White House in personnel selection at the SEC, the Subcommittee recognizes problems can arise from referrals from any source which might use its influence to hire biased or otherwise unqualified candidates. The Subcommittee also believes that there can be significant benefits to the SEC, in the form of qualified staff, from well-intended referrals. It would be unwarranted to suggest that no referrals could be made by the White House or any other source. The Subcommittee does recommend that all referrals, letters, or memoranda, whether from the Executive Branch, the Congress, or private sources, be placed in a file available for public inspection, in order to reduce or eliminate the effect of referrals that represent improper pressures upon the agency. The Subcommittee commends the SEC for its demonstrated ability to withstand the pressure

of a continual stream of political referrals as evidenced by the data set forth in the third case study.

With respect to the matter of clearance by the White House, the subcommittee recommends that action be taken to terminate political clearance of staff of the SEC and of the other independent regulatory commissions. In light of the important policymaking and quasi-judicial functions which the SEC and its sister commissions perform, there can be no justification for requiring political qualifications not prescribed by statute. However, the problem may be more fundamental than determining whether one office or another should or should not clear candidates for positions. In light of the characteristics of Schedule C and NEA positions which have been assigned by the Civil Service Commission, the Subcommittee concludes that no NEA positions should be assigned to the independent regulatory agencies and that the Schedule C positions should be limited. It may be appropriate to assign Schedule C for confidential secretaries or personal assistants to the Commissioners. Even for these positions, there is no basis for tolerating political clearance, although it would be proper to allow the principal to select personal staff or to allow the Commission to select a limited number of senior officials on a noncompetitive basis.

FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 3

FEDERAL TRADE COMMISSION

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CHAPTER 3

FEDERAL TRADE COMMISSION

I. Summary

The Federal Trade Commission, established by the Congress in 1914, has the responsibility for proceeding against "unfair methods of competition" and "unfair or deceptive acts or practices" which harm consumers. The Commission also has responsibilities under various specialized consumer protection statutes as well as information-gathering and reporting functions. In relationship to its awesome responsibilities, its resources are limited, with a current budget of \$52.8 million and less than 1,700 employees.

The Commission has been extensively criticized during its existence for excessive concentration upon matters of small economic consequence. As a result of reorganizations during the early 1970's, it has begun to attract a high caliber of professionals and has become a much more effective law enforcement agency. Its authority to issue substantive "Trade Regulation Rules" (proscribing certain unfair acts and practices) was affirmed by the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, enacted on January 4, 1975.

As a result of its improvements, the Commission has begun to consider some major antitrust and consumer protection problems. In the antitrust area, it has issued complaints against the petroleum and cereal industries as well as against the American Medical Association for alleged anti-competitive practices. Recently, the Commission announced a major investigation into the automobile industry. In the area of consumer protection, the Commission has recently issued a final Trade Regulation Rule which limits the use of the common law "holder-in-due-course" rule and may benefit consumers substantially. The Commission is currently considering proposed Rules in areas such as hearing aids, prescription drugs, eye glasses, and the funeral industry, among others.

The Federal Trade Commission (FTC) has improved its operations. It has become one of the more effective regulatory agencies. It has the potential (not yet fully realized) to make major contributions to curb inflation and to increase consumer protection in the marketplace. Nonetheless, the Subcommittee has identified several conditions which handicap its performance. We believe we also have identified actions necessary to correct those conditions and to raise the level of Commission performance to conform to the public's expectations.

First, the Subcommittee has found that the Commission's enforcement of its antitrust responsibilities in major cases is hampered by the burdensome nature of its administrative proceedings, as in the current *Exxon* case. The Subcommittee therefore recommends enactment of new legislative authority to permit the Commission to file its antitrust cases directly in Federal district court.

In the Commission's Bureau of Consumer Protection, the Subcommittee has found several opportunities to improve the agency's use of its resources. The Commission has failed to develop a clear set of priorities for future commitment of resources for consumer protection with the result that its resources are not applied as effectively as possible. Its regional offices, which have a large percentage of the staff, tend to pursue consumer protection cases of relatively minor economic import. Further, the Commission has failed to use its rulemaking authority extensively enough to curb trade practices harmful to consumer interests but has tended to bring administrative actions against individual violations which consume a disproportionate share of its resources. The Subcommittee therefore recommends that the Commission develop and apply priorities for future action by the Bureau of Consumer Protection and that it direct its staff to divert its efforts from administrative cases toward rulemaking.

The Subcommittee has found that the Commission's ability to obtain vital information has been hampered by its lack of adequate statutory authority and by the inclination of the sources of that information to delay the Commission's investigation. The Subcommittee therefore recommends the passage of S. 642 (or a similar bill) which strengthens the Commission's compulsory process authority to obtain data from industries.

With respect to newly granted authority, the Subcommittee believes that the Commission has not exercised sufficiently its recently expanded power to seek injunctions, perhaps because some courts have narrowly interpreted this authority inconsistently with Congressional intent. The Commission has not attempted to gain modification of this judicial language by further assertions of its injunction power. The Subcommittee therefore recommends that the Commission attempt to gain such a modification from the courts and, if the courts remain unconvinced, that Congress clarify its intent.

In examining the Commission's Rules of Practice, the Subcommittee has identified two weaknesses: The rules forbidding *ex parte* communications with a Commissioner do not cover such contacts while a recommended complaint is pending. In the American Gas Association investigation, such communications led, at minimum, to an appearance of impropriety. Also, the Commission's rules on "clearance to practice" for former employees utilize a vague standard which provides little guidance for either the Commission or the public and may have allowed some former employees to practice before the agency who should not have been so cleared. The Subcommittee therefore recommends that both of these rules be changed so that the *ex parte* rule would apply to recommended complaints and other enforcement actions and so that the "clearance" rule would prohibit all participation by former high-level employees for at least two years.

The Subcommittee has also examined the Commission's new authority to fund directly persons or groups which can add valuable testimony to its rulemaking proceedings by representing an otherwise unrepresented interest. This participation was analyzed in the context of the Commission's current rulemaking on the hearing aid industry. The Subcommittee has found that such participation is extremely useful and we commend the Commission for its decision

to fund such groups. Further, we recommend additional funding of public witnesses by other Federal regulatory agencies.

The Federal Trade Commission has extremely broad responsibilities in antitrust and consumer protection. Its resources, compared with the size and complexity of the industries which it must examine, are small. Despite the limited budget, FTC has made highly effective use of its funds. The Subcommittee believes that its effectiveness could be substantially increased by additional resources and therefore recommends that its budget and personnel be significantly increased to reflect its important mandate.

II. Mandate

The Federal Trade Commission (FTC) was created by Congress in 1914¹ to protect against "unfair methods of competition."² The impetus for the creation of the Commission came from dissatisfaction with judicial interpretations of the Sherman Antitrust Act,³ which had been enacted in 1890 and which had declared that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal . . ."⁴ The Clayton Act,⁵ which was passed contemporaneously with the Federal Trade Commission Act, set specific standards for antitrust violations and gave the new Federal Trade Commission the jurisdiction to enforce the Clayton Act.⁶

In 1938, Congress broadened the Federal Trade Commission's authority by the enactment of the Wheeler-Lea Act,⁷ which declared unlawful "unfair or deceptive acts or practices in commerce."⁸ The effect of this amendment was to allow the Commission to investigate practices which adversely affected consumers but did not necessarily have an impact on competition. Throughout the years, Congress has given the Federal Trade Commission responsibilities in many specialized consumer protection statutes: the Federal Cigarette Labeling and Advertising Act,⁹ the Truth in Lending Act,¹⁰ the Fair Credit Reporting Act,¹¹ and others.¹²

¹ 38 Stat. 717, as amended; 15 U.S.C. 41 *et seq.*, approved September 26, 1914.

² Section 5, Federal Trade Commission Act, 15 U.S.C. 45.

³ 26 Stat. 209, as amended; 15 U.S.C. 1, approved July 2, 1890.

⁴ *Id.* See generally G. Henderson, The Federal Trade Commission, 1-48 (1924) [herein after cited as "Henderson"].

⁵ 38 Stat. 720, as amended; 15 U.S.C. 12; approved October 15, 1914, as amended by P.L. No. 74-692, 49 Stat. 1526 (Robinson-Patman Act), and as amended by P.L. No. 81-899, 64 Stat. 1125 (Celler-Kefauver Antimerger Act).

⁶ Under Sections 3, 7, and 8 of the Clayton Act, the Commission is charged with the duty of preventing and eliminating unlawful tying contracts, corporate mergers and acquisitions, and interlocking directories. Under the Clayton Act, as amended by the Robinson-Patman Act, the Commission is charged with the prevention of certain specified practices, i.e., unlawful price and related discriminations.

⁷ 52 Stat. 111, approved March 31, 1938.

⁸ Section 5, Federal Trade Commission Act, 15 U.S.C. 45. This wording was amended by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, P.L. No. 93-637, 15 U.S.C. 2301, so that Section 5(a)(1) of the Federal Trade Commission Act now reads: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

⁹ 79 Stat. 282, as amended; 15 U.S.C. 1331 *et seq.*

¹⁰ 82 Stat. 146, as amended; 15 U.S.C. 1601 *et seq.*

¹¹ 84 Stat. 1128, 15 U.S.C. 1681 *et seq.*

¹² The Export Trade Act (40 Stat. 516, as amended; 15 U.S.C. 61-65), the Packers and Stockyards Act (42 Stat. 159, as amended; 7 U.S.C. 181-229), the Wool Products Labeling Act (54 Stat. 1128, as amended; 15 U.S.C. 68-68j), the Trademark Act (60 Stat. 427, as amended; 15 U.S.C. 10521-72), the Fur Products Labeling Act (65 Stat. 175, as amended; 15 U.S.C. 69-69j), the Textile Fiber Products Identification Act (72 Stat. 1717, as amended; 15 U.S.C. 70-70K), and the Hobby Protection Act (87 Stat. 687, 15 U.S.C. 2101 *et seq.*) among others.

In its most significant recent action, Congress enacted in 1974 the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.¹³ This Act clarified the Commission's authority to make substantive Trade Regulation Rules¹⁴ and gave the Commission authority to seek consumer redress and civil penalties for law violations. The Act also mandated that the Commission issue rules concerning the disclosure and grading of warranties for consumer products.

The Federal Trade Commission therefore may be said to have three basic law enforcement mandates:

(1) To preserve competition by acting in instances where an "unfair method of competition" has allegedly occurred;

(2) To protect consumers from "unfair or deceptive acts or practices," and;

(3) To enforce various specialized consumer protection statutes within its jurisdiction.

In addition to its specific law enforcement responsibilities, the Commission has a fourth mandate; to gather, compile, and publish information relating to corporations and industries and to report its findings to Congress.¹⁵

The Federal Trade Commission has been a frequent target of criticism.¹⁶ A persistent charge has been that the Commission expends too many resources on relatively trivial matters. In 1924, it was suggested that the Commission "should exercise a greater discretion in selecting those cases which involve questions of public importance."¹⁷ A Commission of the American Bar Association voiced the same complaint 45 years later. It concluded that "[t]he failure of the FTC to establish and adhere to a system of priorities has caused a misallocation of

¹³ P.L. No. 93-637, 88 Stat. 2183, 15 U.S.C. 2301, approved January 4, 1975.

¹⁴ See *National Petroleum Refiners Association v. Federal Trade Commission*, 340 F. Supp. 1343 (D.D.C. 1972), *aff'd.*, 482 F.2d 672 (D.D.Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

¹⁵ Section 6 of the Federal Trade Commission Act provides:

That the commission shall also have power—

(a) To gather and compile information concerning and investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce and its relation to other corporations and to individuals, association, and partnerships.

(b) To require, by general or special orders corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relations to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission.

* * * * *

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

¹⁶ See e.g., Elman, *Administrative Reform of the Federal Trade Commission*, 59 Geo. L.J. 777 (1971); Report of the ABA Commission to Study the Federal Trade Commission (1969) [hereinafter cited as ABA Report]; E. Cox, R. Fellmeth & J. Schulz, *The Consumer and the Federal Trade Commission* (1969) Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 Minn. L. Rev. 390 (1964); Report on Regulatory Agencies to the President-Elect (1960); Commission on Organization of the Executive Branch of the Government, Task Force Report on Regulatory Commissions (1949); Herring, *Politics, Personalities and the Federal Trade Commission I and II*, 28 Am. Pol. Sci. Rev. 1016 (1934), 29 Am. Pol. Sci. Rev. 21, (1935) Henderson, *supra* note 4.

¹⁷ Henderson 337-38.

funds and personnel to trivial matters rather than to matters of pressing public concern."¹⁸

A second persistent problem has been excessive delay.¹⁹ The ABA Commission noted in 1969 that "[p]roblems of delay have vexed the FTC ever since it was established, and some of the most notorious examples of protracted administrative proceedings have occurred in that agency."²⁰

In view of these flaws, the Commission introduced major changes in recent years, rearranging its Bureaus and Divisions to reflect its mandates. Its new Office of Policy Planning and Evaluation is charged with the responsibility of recommending "how and where its resources should be utilized in order to best serve the public interest."²¹ Evaluation committees have been created in the two major operating bureaus in an attempt to screen potential cases closely.

It appears that the Federal Trade Commission has made progress in allocating its resources according to degree of importance. The Commission's antitrust program has increased its emphasis on "industry-wide" investigations and complaints, such as those for the petroleum,²² cereal,²³ and automobile²⁴ industries. In consumer protection, with its authority to issue substantive "Trade Regulation Rules" (TRR's) affirmed by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, the Commission has addressed significant consumer problems. It is currently considering proposed rules for funeral services, prescription drugs, eyeglasses, hearing aids, and credit practices, among others. The Commission has issued final Trade Regulation Rule for mailorder merchandise and amplifiers. It recently issued a final TRR which modified the common law by limiting the use of the "holder-in-due-course" rule by banks and other note purchasers to escape responsibilities for defects in merchandise. Consumers may no longer be compelled to pay the note-holder if the merchandise proves defective.²⁵

III. Implementation of the Mandate

To carry out its law enforcement responsibilities the Federal Trade Commission has used four different methods:

- (1) Advisory opinions;
- (2) Industry guides;
- (3) Trade regulation rules; and
- (4) Administrative proceedings which may result in cease-and-desist orders.

Advisory opinions are issued upon the request of a person or corporation which seeks the Commission's advice about a proposed course of

¹⁸ ABA Report, *supra* note 16.

¹⁹ See, e.g., Elman, *supra* note 16; ABA Report 28-32.

²⁰ ABA Report 28 (footnote omitted).

²¹ Sec. 13, Manual of Organization of the Federal Trade Commission.

²² *Erron Corp. et al.*, FTC Docket No. 8934. See Section III (A) of this Chapter.

²³ *Kellogg Corp. et al.*, FTC Docket No. 8883.

²⁴ The Commission announced on August 2, 1976 that it had been granted clearance by the Department of Justice to open a major antitrust investigation of the structure of the domestic automobile industry.

²⁵ Under the "holder-in-due-course" doctrine, a consumer was obliged to continue payment to a creditor holding an installment contract even if there was a defect in the product purchased. The new rule requires that consumer credit contracts preserve the buyer's right to dispute the obligation to pay if the goods are defective.

action.²⁶ The advisory opinion is not binding upon the Commission but the issuance of an advisory opinion will normally indicate what the Commission's continuing view of a practice will be.²⁷

Industry guides are meant to provide guidelines for voluntary action by an industry and relate to a practice or series of practices within an industry.²⁸ Though industry guides do not have the force of law, "[f]ailure to comply with the guides may result in corrective action by the Commission . . ."²⁹

A *Trade Regulation Rule (TRR)* also concerns practices within a given industry but, unlike a guide, has the force of law. It is in essence a determination that certain practices are "unfair or deceptive" and thus violate the Federal Trade Commission Act. A Trade Regulation Rule is prospective in nature. It indicts no one for past conduct but forbids such conduct in the future.³⁰

An *administrative action* may be brought against an alleged violator when the Commission has "reason to believe"³¹ that the Federal Trade Commission Act has been violated. The Commission first issues a complaint. If the respondent does not admit the violation and accept an agreement to cease the offensive action, a hearing is held before an Administrative Law Judge. The Judge, after the hearing, issues an "initial decision" which becomes the Commission's final order if not appealed within 30 days. If appealed to the Commission itself, the Judge's decision may be affirmed, modified, or reversed. If the Commission finds that a violation has been committed, it may order that the offensive act or practice cease.

As an adjunct to an administrative action, the Commission has been given new authority recently to seek a temporary restraining order or a preliminary injunction in Federal court to stop the offending practice while the administrative case is pending.³² In appropriate cases, the Commission may also seek a permanent injunction.³³

The work of the Federal Trade Commission covers a large variety and number of actions proceeding at one time. In 1922 the Commission

²⁶ See FTC Procedures and Rules of Practice, Part I, Subpart A Section 1.1, 1.4. An advisory opinion will not be issued:

"(a) where the course of action is already being followed by the requesting party; (b) where the same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding, order, or decree initiated or obtained by the Commission or another governmental agency; or (c) where the proposed course of action or its effects may be such that an informed decision thereon cannot be made or could be made only after extensive investigation, clinical study, testing or collateral inquiry." *Id.*, Section 1.1 Policy.

²⁷ *Id.*, Section 1.3(b) states that:

"Any advice given is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the advice. Notice of such rescission or revocation will be given to the requesting party so that he may discontinue the course of action taken pursuant to the Commission's advice. The Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval."

²⁸ *Id.*, Section 1.5-1.6.

²⁹ *Id.*, Section 1.5.

³⁰ Trade Regulation Rules have been promulgated only to protect consumers, although there is some support for rulemaking about "unfair methods of competition." See *Burrus & Jeter, Antitrust: Rulemaking v. Adjudication in the FTC*, 54 Geo. L. J. 1106 (1966). In response to a Subcommittee question in December, 1975, the FTC stated that:

"The staff of the Bureau of Competition are conducting legal research regarding the authority of the Commission to issue Trade Regulation Rules in the competition area. Careful consideration is being given, in addition, as to whether and under what conditions such proceedings would be appropriate. No conclusions have been reached or recommendations made in this regard, however, and no 'study' exists regarding this area." [Subcommittee files].

³¹ Section 5(b). Federal Trade Commission Act, 15 U.S.C. 45.

had 354 investigations pending.³⁴ Its budget then was less than one million dollars; its staff little more than 300.³⁵ The number of pending investigations reached a high of 3,993 in Fiscal Year 1965.³⁶ By 1973, the number of pending formal investigations had dropped substantially; ³⁷ only 120 new formal investigations were initiated that year.³⁸

A similar trend has been evident for administrative complaints. In 1922, there were 257 complaints pending.³⁹ By 1962, the number of pending complaints had risen to 282.⁴⁰ The number of new complaints issued declined from 431 in 1963⁴¹ to 138 in 1973.⁴² In 1975, new complaints issued numbered only 42.⁴³ This decline in numbers may reflect both the shift to large cases in the Bureau of Competition and the increased use of trade regulation rules instead of administrative actions by the Bureau of Consumer Protection.

In addition to investigations and administrative complaints, the staff is at work on advisory opinions, industry guides, new trade regulation rules, and compliance actions. In 1975, for example, the Commission provided at least 75 advisory opinions to the business community.⁴⁴ As of early 1976, 17 proposed trade regulation rules were pending before the Commission.⁴⁵ Compliance actions resulted in 18 divestiture orders during fiscal 1975⁴⁶ and the assessment or affirmation of about \$4 million for failure to comply with antitrust orders.⁴⁷

³⁴ This was added by the Trans-Alaska Pipeline Authorization Act of 1973, P.L. No. 93-153, which amended Section 13(b) of the Federal Trade Commission Act to read:

"(b) Whenever the Commission has reason to believe—(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue a permanent injunction. Any such suit shall be brought in the district in which such person, partnership or corporation resides or transacts business."

³⁵ A recent decision indicates that the showing of evidence necessary for an injunction may be difficult. See *FTC v. Simeon Management Corp.*, 391 F. Supp. 697 (N.D. Cal. 1975), *aff'd*, 532 F. 2d 708 (9th Cir. 1976). The holding appears contrary to the Congressional intent (see pp. 90-91, *infra*).

³⁶ There were 231 "applications for complaints" docketed with the Commission and 123 docketed with the "branches" as the field offices were called at that time. Annual Report of the Federal Trade Commission at 17, 38, cited in Henderson, *supra* note 4, at 337-38.

³⁷ Henderson, 338.

³⁸ ABA Report 19, Table III. This is the number of "formal investigations" or "seven-digit investigations" (so-called because the file number contains seven digits) and does not include "preliminary investigations."

³⁹ For an analysis of the activities of the Federal Trade Commission for the years 1971-1974, see *The Federal Trade Commission—1974*, Staff Report on the Subcommittee on Consumer Protection and Finance, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 93d Cong., 2d Sess. (1974).

⁴⁰ *Id.* at 17.

⁴¹ Henderson 338.

⁴² ABA Report 21, Table XII.

⁴³ *Id.* at 20, Table IV. This includes 365 complaints settled by consent.

⁴⁴ *The Federal Trade Commission—1974*, *supra* note 37, at 18. This includes 109 complaints settled by consent.

⁴⁵ Federal Trade Commission, Annual Report to the Congress, Fiscal Year 1975, at 3, 20. For data on the average age of pending proceedings, see Appendix A-8 to this Report.

⁴⁶ *Id.* at 15.

⁴⁷ Testimony of Calvin J. Collier, Chairman, Federal Trade Commission in *Regulatory Reform—Vol. IV, Hearings before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, Serial No. 94-83, 94th Cong., 2d Sess. 519 (1976).

⁴⁸ Federal Trade Commission, Annual Report to the Congress, Fiscal Year 1975, at 3.

⁴⁹ *Id.*

In the Bureau of Consumer Protection, compliance activities in the 1975 fiscal year resulted in judgments for \$273,000 in 7 cases.⁴⁸ Another 23 cases were certified to the Department of Justice or filed in court that year.⁴⁹

The Federal Trade Commission's budget and staff have increased moderately. In fiscal 1971, for example, the Commission had a budget of approximately \$22.5 million and employed 1325 people. For fiscal 1977, the Commission has a budget of \$52.8 million and a staff of approximately 1700.

The Commission is an improving agency which performs its public mission well in most matters. However, it does need improvement in some areas and seven of the eight case studies which follow were selected because they illustrate weaknesses in the Commission's authority, the Commission's Rules of Practice or the Commission's method of organizing its work. The petroleum industry litigation ("*Exxon* case") was analyzed both because it is the largest antitrust action ever undertaken by the Commission and because it demonstrates certain problems with such cases in an administrative agency. Two aspects of resource allocation decisions were examined in the Bureau of Consumer Protection because these decisions determine the future direction of the Commission's consumer protection activities.

The case study on the Commission's authority to gather information was selected because of its importance in terms of the Commission's ability to enforce the law. The Commission's newly broadened injunction authority was examined because of its potential importance as a law enforcement tool. Case studies were on parts of the Commission's Rules of Practice which have weaknesses, the Rules on *ex parte* contacts and on "clearance to practice" of former employees were selected because of their impact upon the public's confidence in the objectivity of the Commission.

The eighth case study analyzes the new mechanism for direct funding of the public groups to participate in Commission rulemaking. It reveals not a weakness but rather the value of this new procedure for receiving the views of concerned citizens.

IV. Case Studies

A. THE PETROLEUM INDUSTRY LITIGATION ("EXXON CASE")

The "petroleum industry litigation" or the "*Exxon* case,"⁵⁰ which is a current administrative proceeding at the Federal Trade Commission,⁵¹ is one of the most complex antitrust cases ever litigated. Review of this proceeding demonstrates the immense difficulties which the Commission has had and will continue to have with cases of this dimension. We explored the following questions:⁵²

⁴⁸ *Id.* at 23. For further information on compliance activities, see Appendix A-9 to this Report.

⁴⁹ *Id.* For information on refusals to initiate FTC litigation, see Appendix A-6 to this Report.

⁵⁰ FTC Docket No. S934.

⁵¹ In fiscal year 1976, the *Exxon* case was budgeted for an expenditure of \$2.5 million and 45 man-years.

⁵² The Subcommittee's analysis was not directed to the question of whether or not the respondents have in fact violated the Federal Trade Commission Act. No statement in this Report is meant to influence the Federal Trade Commission in its adjudication of this case, nor should any implication concerning the Subcommittee's opinion on the merits of the case be drawn from its selection of the issues. The Subcommittee's belief is that, as the *Exxon* case raises issues vital both to national energy policy and to the future of complex litigation at the FTC, these issues should be promptly resolved by the Commission.

(1) Can an antitrust case of this magnitude and complexity be handled appropriately in an administrative rather than a judicial forum?

(2) Has the Commission managed this adjudication adequately and allocated sufficient resources to its resolution?

(3) How long will it take for this case to proceed to a hearing before the Administrative Law Judge, then through review by the Commission, and finally into court review?

(4) Have there been deliberate attempts on the part of the respondents to delay this litigation? If so, how successful have they been?

1. The course of the discovery proceedings

On July 18, 1973, the Federal Trade Commission issued a complaint against Exxon and seven other major producers of petroleum products: Texaco, Gulf, Mobil, Standard Oil (California), Standard Oil (Indiana), Shell, and Atlantic-Richfield. The complaint was the result of a nearly two-year investigation into the restrictive practices of the major integrated oil companies.⁵³ The Preliminary Staff Report on this investigation was transmitted to Senator Henry M. Jackson, Chairman of the Senate Committee on Interior and Insular Affairs on July 6, 1973 (in response to his request of May 31) and made public a few days later.⁵⁴

A major emphasis of the Preliminary Staff Report was to determine the causes of the then current petroleum shortage. The staff concluded that the shortage "can be traced to six separate, but interrelated factors:

- (1) The Oil Import Control Program;
- (2) Interdependent and cooperative behavior by the largest oil firms;
- (3) The failure of these firms to construct refinery capacity sufficient to meet current needs;
- (4) Government induced barriers to entry which have inhibited non-integrated firms from entering into refining;
- (5) An insufficient supply of domestic crude for independent refiners; and
- (6) The fact that major station gasoline prices have not been allowed to reach their natural level during the period of shortage in certain areas of the country."⁵⁵

The staff found further that:

"These major firms, which consistently appear to cooperate rather than compete in all phases of their operation have behaved in a similar fashion as would a classical monopolist: they have attempted to increase profits by restricting output. With their advanced econometric models and computer simulations, the major oil companies should have been able to predict the current increase in demand for petroleum products. Whatever their forecasts

⁵³ The Commission had approved on September 14, 1971, a resolution for the use of compulsory process "to investigate the acts and practices of firms engaged in the production or refining of crude oil or the distribution of petroleum products to determine the effect of vertical integration and joint ownership and operating arrangements on the structure, conduct and performance of the petroleum industry. . . ."

⁵⁴ "Investigation of the Petroleum Industry," Permanent Subcomm. on Investigations, Comm. on Government Operations, United States Senate (Committee Print, July 12, 1973).

⁵⁵ *Id.* at 38.

showed, however, they failed to expand refinery capacity sufficiently to meet this demand.”⁵⁶

It was the contention of the Commission staff that a major factor in the competitiveness of the petroleum market is the viability of the independent refiners and independent marketers.

The staff alleged that:

“Efforts by the majors to squeeze the independents’ market share have kept retail gasoline prices from responding to excessive demand. In a normal competitive market the ‘cure’ for a shortage would be for prices to increase. The higher prices would cause producers to increase supply and at the same time it would discourage some amount of consumption. Thus supply and demand would be brought into equilibrium. But what has happened here is that the majors have used the shortage as an occasion to attempt to debilitate, if not eradicate, the independent marketing sector.”⁵⁷

The complaint issued by the Commission listed a variety of acts and practices which the respondents had allegedly committed. The effect of these acts and practices has been, according to the complaint, to violate the Federal Trade Commission Act in three ways:

(1) The acts and practices “constitute a combination or agreement to monopolize refining of crude oil into petroleum products . . .;”⁵⁸

(2) The companies “have maintained monopoly power over the refining of crude oil into petroleum products . . .;”⁵⁹

(3) The companies “have restrained trade and maintained a noncompetitive market structure in the refining of crude oil into petroleum products . . .”⁶⁰

The complaint was not specific about the type of relief that would be requested. It merely stated that “the Commission may order such relief as is necessary or appropriate in order to correct or remedy the effects of anti-competitive practices engaged in by the respondents and to restore competition in the relevant market or markets.”⁶¹ However, subsequent events made it clear that divestiture of pipeline and refinery operations would probably be requested. Speaking at a news conference immediately following the issuance of the complaint, James T. Halverson, then Director of the Bureau of Competition, said that:

We are also looking at the potential for divestiture relief. We think to pressure [*sic*] the independent marketer in the United States it may be appropriate to have the creation of an additional independent viable refining capacity in the relevant market we have identified and of course that would require divestiture of refining capacity and connecting pipelines. That does not rule out any other form of divestiture relief or other forms of injunctive relief I have not mentioned.⁶²

⁵⁶ *Id.*

⁵⁷ *Id.* at 29.

⁵⁸ Complaint of *Federal Trade Commission v. Exxon Corp., et al.*, (DK. #8934), July 18, 1973, at 11; Trade Reg. Rep., 1973 Trade Cas. § 20, 388.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Complaint, *supra* note 58, at 13.

⁶² Federal Trade Commission News Conference, reported in Antitrust and Trade Regulation Reporter (Bureau of National Affairs), No. 623 at p. D-1 (July 24, 1973).

[Note: Mr. Halverson probably meant “protect” rather than “pressure” in the second sentence. We assume “pressure” was either a slip of the tongue or a reporter’s error.]

The major oil companies were thus faced with a complaint which alleged a variety of anti-competitive practices and which conceivably could lead to a major restructuring of the industry through divestiture of pipelines and refinery capacity. Their response was immediate and vigorous. During the month of August 1973, each of the eight respondents filed a "Motion for a More Definite Statement." This motion requested the Administrative Law Judge (ALJ) to require the Commission's trial staff to specify more clearly the alleged anti-competitive acts and practices. After a reply by the Commission attorneys, on November 23, 1973, the Judge denied the respondents' motion for a more definite statement and scheduled a pre-hearing conference for December 18, 1973. The respondents attempted to have this order reversed by the Commission but were unsuccessful.⁶³

It was clear from the outset that the ability of the Commission's complaint counsel (the attorneys prosecuting the administrative case) to prove any antitrust violations would depend in great measure on their ability to obtain internal oil company documents through the pre-trial discovery process. The first step in that process was to learn enough about the oil companies' record-keeping systems so as to be able to specify the needed documents. This is because subpoena for documents must specify the documents with sufficient particularity to allow the respondents to determine reasonably well what is required.⁶⁴

On December 7, 1973, complaint counsel filed their first "Application for Oral Depositions." That application requested authorization from the Judge to question the comptroller of each of the eight oil companies regarding the structure of the company and the identification, location, and contents of various corporate records.⁶⁵

On December 12, 1973, the application was granted, and subpoenas *ad testificandum* (for testimony) were issued shortly thereafter. During December, all eight of the companies filed with the Administrative Law Judge motions to quash the subpoenas. Illustrative of their arguments was the statement by Gulf Oil Corporation that:

"The Information sought clearly will not "round out," "extend," or "supply further details," but is designed to provide the basic knowledge necessary to investigate this Respondent, in order to make a *prima facie* case against this and other Respondents. This postcomplaint investigation by the staff is necessitated by the premature filing of the Complaint under extreme political pressure before

⁶³ At the same time, pressure had come from certain sectors of the Administration for the withdrawal of the FTC complaint. On September 4, 1973, the Treasury Department sent a "Report on the FTC's Petroleum Investigation" to the Commission and made that report public the next day. The Treasury Report challenged all of the major findings of the FTC and concluded that "[m]any of the facts in the FTC report are inaccurate. Consequently, the resulting conclusions are questionable." (Report at 3). The Treasury Report further alleged that success of the complaint "would cause considerable adverse impact on future domestic energy supplied." (Report at 5).

Responding to the Treasury Report on September 7, 1973, James T. Halverson, then Director of the Bureau of Competition wrote to then Deputy Secretary William E. Simon. Mr. Halverson argued that the Treasury analysis "demonstrated a misunderstanding of both the Commission's complaint and the staff report." Halverson pointed out that the data upon which the Treasury report was based was incomplete and totally supplied by the petroleum industry. At the same time, it was learned that Deputy Treasury Secretary Simon had previously written FTC Chairman Engman on July 30 expressing "a great deal of concern" about the FTC complaint and asked to meet with Engman. The letter was intercepted by an Engman aide, who feared that it could be an improper attempt to influence a Commissioner and the meeting was never held.

⁶⁴ See *United States v. Morton Salt*, 338 U.S. 632 (1950); *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924); *United States v. R. J. Reynolds Tobacco Co.*, 268 F. Supp. 769, 777 (D.N.J. 1966).

⁶⁵ Application to Take Oral Deposition submitted by Counsel Supporting the Complaint, *Exxon Corp. et al.*, Docket No. 8934, Federal Trade Commission, December 7, 1973, at 3.

the investigation was completed, and while several subpoenas *duces tecum* served on major oil companies were still pending. The Rules of Practice and Procedure as formulated by and construed by the Federal Trade Commission (1) do not allow postcomplaint discovery until after specification and clarification of the issues of fact and law, and (2) state that postcomplaint investigation of the nature sought by the staff in this proceeding is absolutely prohibited. The state of the record in the subject proceeding mandates quashing the subpoena on either basis.⁶⁶

During the consideration on the depositions by the Commission in early 1974, the respondents also attempted to persuade the Commission that the complaint should be dismissed because the Commission did not have "reason to believe" that the Federal Trade Commission Act had been violated and the proceeding was not in the "public interest." These issues were certified to the Commission by the Judge on February 1, 1974, and the Commission denied the Motions to Dismiss on February 12, 1974. The Commission's order denying reconsideration⁶⁷ on June 4, 1974, held that the complaint had been properly issued and commented on Congressional interest relative to the complaint:

"Respondent's argument that Congressional interest rather than the public interest prompted the issuance of this complaint is misplaced. None of the communications received by this agency from any Member of Congress is even remotely of the character deemed improper by the courts. *Pillsbury v. FTC*, 354 F.2d 952 (5th Cir. 1966); *D. C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971). And it has long been settled that the adequacy of the Commission's 'reason to believe' a violation of law has occurred and its belief that a proceeding to stop it would be in the 'public interest' are matters that go to the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred. This is the posture of the instant matter."⁶⁸

A major issue which arose in early 1974 in the *Exxon* case was the right of the respondents to obtain access to documents in the Commission's files which had formed the basis for the complaint recommendation. On February 15, 1974, Exxon, Gulf, Mobil, Shell, and Arco filed a motion for the issuance of a subpoena for documents in the Commission's files. At the same time, respondents attempted to take depositions from Commission employees and other government employees. Mobil Oil Corporation moved on February 19, 1974, for a subpoena to depose Chairman Lewis Engman. Respondents moved on March 29, 1974, for subpoenas to other present and former government officials, including Dr. Paul McCracken (former Chairman of the Council of Economic Advisors), Stephen Wakefield (former Assistant Secretary of the Interior and then at the White House), Professor Phillip Areeda of Harvard Law School (former Executive Director of the President's Cabinet Task Force on Oil Import Con-

⁶⁶ Memorandum in Support of the Motion to Quash and Motion to Dismiss Made on Behalf of Gulf Oil Corporation, Exxon Corp., *et al.*, Docket No. 8934, Federal Trade Commission, December 21, 1973, at 6.

⁶⁷ Both the Respondents and complaint counsel urged reconsideration in order to clarify the Commission's policy on post-complaint investigations.

⁶⁸ Federal Trade Commission, Exxon Corp., *et al.*, Docket No. 8934, Order Denying Reconsideration, June 4, 1974, at 1.

trol) and Governor John A. Love (former Director of the Federal Energy Office). On April 19, 1974, the Judge denied Mobil's motion for a subpoena to Chairman Engman.

At that point, the Commission's complaint counsel were attempting to proceed with their pretrial discovery. On February 22, 1974, they filed their "Prediscovery Statement." This document included a description of the petroleum industry, the principal acts or practices which the complaint was designed to test, an outline of the principal facts to be proven, a statement of the law, a statement of legal and factual issues, replies to respondents' questions and a statement of contemplated relief. Respondents replied to this Prediscovery Statement by moving to strike certain allegations in the complaints and certain principal facts in the Prediscovery Statement.⁶⁹

Complaint counsel's next step was to apply for further depositions regarding record-keeping systems. As complaint counsel were preparing this motion, the respondents filed two joint briefs on June 17, 1974. The first of these was a lengthy brief on the issues of "*res judicata*" and "*collateral estoppel*" in which the respondents argued that previous court decisions regarding the petroleum industry prevented the Commission from raising certain issues. The second Joint Brief related to "governmental action" and "primary jurisdiction." Respondents argued that "Section 5 of the Federal Trade Commission Act cannot be applied to state or Federal governmental action, the consequences of government action, or the conduct of private parties resulting from governmental action."⁷⁰ The oil companies further asserted that, because the Commission lacks primary jurisdiction over energy policy, the issues must be referred first to other Federal officials.⁷¹

Complaint counsel proceeded to file their application for further oral depositions on June 25, 1974. This application requested depositions from 5 or 6 corporate officials for each of the 8 companies (44 people in total) with respect to corporate structure and the identification, location, and contents of various corporate records.⁷²

It was at this point that complaint counsel received a severe setback, as their application was denied by the Administrative Law Judge on July 9, 1974. The Judge reasoned that:

Complaint counsel have fallen far short of showing that the requested depositions are necessary and that the information sought is unobtainable by voluntary methods. Instead, they have done no more than to submit argumentative, unsupported, and unpersuasive statements to the effect that "depositions are the only suitable mechanisms available" to them; that consideration of alternative means of obtaining the information is "unrealistic" that even if alternative methods were "theoretically possible," they would require an "unthinkable" expenditure of time; and that enforcement of the "voluntary methods" requirement of Rule 3.33 would mean, in effect, that their discovery plan "would be sidetracked and delayed indefinitely, if not fundamentally destroyed."

* * * * *

⁶⁹ For example, Mobil filed a Motion to Strike on March 6, 1974; Gulf filed a Counterstatement of the Issues and a Motion to Strike on March 23, 1974; and Arco filed a Counterstatement of Issues on March 26, 1974.

⁷⁰ Joint Brief of All Respondents on Issues Relating to Governmental Action and Primary Jurisdiction, Exxon Corp., *et al.*, Docket No. 8934, June 17, 1974, at 8.

⁷¹ *Id.*, at 51.

⁷² Application for Oral Deposition, Exxon *et al.*, Docket No. 8934, Counsel Supporting the Complaint, June 25, 1974, at 2.

Under Commission practice, the taking of depositions, whether for discovery or for the preservation of testimony, is not a routine procedure. The Commission has consistently required justification. Although the Commission has itself questioned the wisdom of the "voluntary methods" provision, *Standard Educators*, 79 F.T.C. 858, 913 (1971), the requirement has persisted. Thus, the wisdom of the Rule is not the issue. In that connection, the administrative law judge rejects complaint counsel's suggestion that their discovery plan, including the instant proposals, has been "endorsed" by the Commission (Showing, p. 6).⁷³

On July 16, 1974, complaint counsel requested leave to appeal the Judge's decision to the Commission. The Judge denied this request on July 22. By this denial, complaint counsel in late summer and fall of 1974 were forced to show that the information needed could not be obtained by "voluntary" methods.

Complaint counsel concluded that the requirement for such a showing would unduly delay the case. They therefore prepared and submitted to the Judge on October 18, 1974, a "Motion for Major Integrated Procedural Relief" to be certified to the Commission for a decision.

In this motion, the *Exxon* trial staff requested that the Commission modify its discovery rules to conform with the Federal Rules of Civil Procedure. The complaint counsel argued that:

The Discovery Rules of the Commission's Rules of Practice are inadequate for thorough and expeditious discovery.

The crux of the problem is the discovery provisions of the Rules of Practice and their woeful inadequacy in the context of this extremely broad and complex litigation. Although there are a multitude of deficiencies in the discovery provisions, their primary failings may be categorized as two: provisions in the Rules that require burdensome, unnecessary procedures and that lead in almost every case to time-consuming litigation; and provisions that wrest control over discovery from the adversary seeking it, ceding substantial power over the course and conduct of discovery to the Administrative Law Judge and, indeed, to the opposing party. These problems and their vast implications in complex and bitterly-contested cases can only defeat meaningful discovery and must be resolved forthwith.⁷⁴

The complaint counsel's motion was certified to the Commission for a decision, which was reached on March 4, 1975.⁷⁵ The Commission declined to adopt the discovery provisions of the Federal Rules of Civil Procedure for the *Exxon* case but noted that the Judge was free to use the *Federal Manual for Complex Litigation*. The Commission further stated that though it preferred not to have special rules for one particular case, new discovery rules for the entire Commission would be promulgated soon. Proposed new discovery rules similar to the Federal Rules of Civil Procedure were in fact issued for comment on April 4, 1975.⁷⁶

The respondents generally opposed the Motion for Procedural Relief. In one brief, submitted by Shell Oil Company and entitled "A Problem Solving Proposal," it was argued that "The surge of events has passed the *Exxon* case by."⁷⁷ The brief argued that the *Exxon*

⁷³ Order Denying Application of Complaint Counsel for Oral Depositions, July 9, 1974, at 4-5.

⁷⁴ Motion of Complaint Counsel for Major Integrated Procedural Relief, October 18, 1974, at 3 (emphasis in original).

⁷⁵ Order Denying Motion for Major Integrated Procedural Relief.

⁷⁶ 40 FR 15239. After extensive comments, those proposed rules were withdrawn on May 28, 1976 (41 FR 21793) and new proposed rules were issued. As of September 23, 1976, no new rules had been adopted.

⁷⁷ A Problem Solving Proposal in Response to Motion for Procedural Relief, submitted by attorneys for Shell Oil Company, November 18, 1974, at 4.

complaint should be withdrawn in favor of a broad study of future national energy policy:

The Exxon case, precipitously filed in a fevered atmosphere, is ill-equipped to materially assist the search for solutions to the current and foreseeable challenge to this nation posed by the energy crisis. Its focus and the assumptions upon which it was based are hopelessly outdated. The ever-changing quality of the energy system and needs of the nation have rendered complaint counsel's objectives nugatory if not dangerous. It represents nothing more than a static approach to a dynamic problem. Thus, the complaint is premised upon dated fact and suppositions about the petroleum industry, a situation which alone invalidates the efficacy of the complaint. Moreover, in view of the future energy and economic crises we face, pursuit of the complaint might well irreparably damage our long-term economic and energy goals.⁷⁸

In the midst of the litigation on the procedural rules, a significant event occurred which created another controversy. The Administrative Law Judge retired at the end of 1974 and the new Judge on January 17, 1975, notified the respondents that he had participated in seven cases involving oil companies while he worked in the Commission's Office of the General Counsel. Texaco moved on March 6, 1975, that the new Judge be disqualified because of his earlier work. The Judge declined to do so but certified the issue to the Commission. The Commission on May 13, 1975, denied the motion, finding that "his role as appellate advocate was neither investigative nor prosecutorial in nature within the meaning of Section 554 [of the Administrative Procedure Act]."⁷⁹

It was clear during the spring of 1975 that the pre-trial discovery phase had only begun. The Judge expressed concern in March that "complaint counsel have made no progress in securing discovery from respondents since the original wave of depositions early in February and March 1974."⁸⁰ After the Commission denied their Motion for Procedural Relief on March 4, the complaint counsel had no choice but to renew their earlier "Application to Take Oral Depositions" from the corporate officials regarding recordkeeping systems.

During the late spring and summer of 1975, litigation continued concerning the "*res judicata*" issue, the "*collateral estoppel*" issue and the Judge's orders regarding preservation of records. It became apparent to complaint counsel that the only way to proceed as quickly as possible to get information about record systems was to reach agreement with respondents as to some "voluntary" method. Therefore, it was agreed that the corporate officials would submit to "voluntary interviews" not under oath or officially on the record, although a transcript would be made. Two of the companies (Gulf and Mobil) preferred formal depositions. A motion clarifying the procedures was filed on May 8, 1975. The interviews began shortly thereafter.

During the summer, respondents renewed their requests to obtain information from Commission employees. On July 29, 1975, Exxon requested interviews with five Commission staff economists.⁸¹ When that request was denied, Exxon moved for a subpoena to the five

⁷⁸ *Id.* at 19.

⁷⁹ Federal Trade Commission, Order Denying Motion to Disqualify Administrative Law Judge, Exxon, *et al.*, Docket No. 8934, May 13, 1975, at 2.

⁸⁰ Order granting, in part, Motion of Certain Respondents for Issuance of Subpoena Directed to Federal Trade Commission and Requiring Complaint Counsel to Resume Discovery Efforts, March 17, 1975, at 9.

⁸¹ Letter to Roger B. Pool, Esq., Federal Trade Commission from William Simon, Howrey & Simon, attorneys for Exxon Corporation, July 29, 1975.

economists on September 2, 1975. The motion was denied by the Judge on September 17, 1975, holding that "Exxon has failed to establish any basis or rationale for granting the deposition request. . . ." ⁸²

The next major action in the *Exxon* case was the filing by all respondents of a Joint Memorandum Relating to Worldwide Changes in the Oil Industry Since the Complaint, which was filed on September 30, 1975.

The oil companies asserted that the complaint should be reassessed in the light of factors such as the changed foreign petroleum situation, the termination of the mandatory oil import program, the elimination of state prorationing, the repeal of the oil depletion allowance and the acceleration of "independent" entry and growth throughout the industry. On October 17, 1975, in a move which apparently surprised both complaint counsel and the Commission, the Administrative Law Judge certified to the Commission on his own motion a recommendation that the Commission consider the withdrawal of the complaint. Responding to the respondents' brief on changes in the oil industry, the Judge noted that:

Given the changes in facts that have occurred since issuance of the complaint and the much broader crisis facing this nation, it is recommended that the Commission consider whether it is preferable, in the public interest, to have such extensive discovery under the complaint (followed by hearings) or, if warranted, to conduct a broader investigation under Section 6 of the Federal Trade Commission Act which investigation could cover the vital issues facing the nation. To the extent that matters now falling under the complaint might be encompassed in any overall investigation, they could, of course, be included. If, in the course of such an investigation, any evidence of law violation were uncovered, the Commission could then take appropriate action, including issuance of a complaint. ⁸³

In a one-page opinion on October 23, 1975, the Commission decided not to withdraw the complaint, by a 3-1 vote, Commissioner Stephen Nye dissenting.

During the winter of 1975-76, complaint counsel analyzed the results of the voluntary interviews to determine which internal company documents would be necessary to prove their case. On February 20, 1976, they submitted to the Judge an 1800 page motion for the issuance of a subpoena for documents from the respondents. If granted, this subpoena would be complaint counsel's first real access to the companies' internal papers. After several extensions, respondents answer was filed on July 6, 1976. They argued that "[t]he burden which would be imposed by the proposed subpoena is unconscionable." ⁸⁴ They alleged that "[m]uch of complaint counsel's proposed discovery is irrelevant and unreasonable." ⁸⁵ As of September 1, 1976, no decision had been reached by the Administrative Law Judge on the subpoena motion.

⁸² Order Denying Motion of Exxon Corporation for Issuance of Subpoenas *ad Testificandum*, September 17, 1975, at 4.

⁸³ Certification to Commission of Recommendation of Administrative Law Judge that Commission consider Withdrawal of Complaint, October 17, 1975, at 5.

⁸⁴ Joint Response to Motion by Complaint Counsel for Issuance of Subpoenas *Duces Tecum* to Respondents, July 6, 1976, Volume I, at 3.

⁸⁵ *Id.* at 8.

2. Analysis of the problems

(a) *The difficulties of complex antitrust litigation in an administrative forum*

The *Exxon* case demonstrates the difficulties of resolving a massive and complex antitrust case in an administrative forum. Two basic problems are prominent. First, the Administrative Law Judge lacks effective power to compel testimony or documents at either the pretrial or trial stages. And second, the Commission, having issued a complaint because it had "reason to believe" that the law *has* been violated, is then placed in the awkward position of deciding whether or not it has been violated, a situation which may lead to the appearance of impropriety with uncertain effects.

During the pretrial and trial stages of any major antitrust litigation, it is critical that the presiding officer have the ability to decide initial procedural issues quickly so that the issues may be sharpened and developed. The difficulty with this in an administrative setting is that the Administrative Law Judge does not have sufficient power to enforce these rulings immediately. Peter A. White, who was for nearly two years the Commission's chief complaint counsel in the *Exxon* case, commented in a recent article that:

... The power of contempt, however infrequently used, is the cornerstone of effective judicial control. Yet the administrative law judges before whom commission cases are tried initially and the commission itself have no contempt (and therefore no enforcement) authority whatever. Accordingly, any order, whether procedural or substantive, of an administrative law judge or the commission may be flatly disregarded (for valid or spurious reasons) by a respondent in a commission proceeding. This action requires the extremely time-consuming and inefficient procedure of the commission initiating enforcement proceedings (in effect a new lawsuit) in federal court.⁸⁸

The Commission itself has agreed with this analysis and has indicated that this is an inherent problem of administrative agencies which contributes to delay. In a June 16, 1976, letter to the Subcommittee, the Commission stated that:

The Commission does believe that the ability to impose immediate and meaningful sanctions for failure to comply with discovery processes would be an aid in expediting hearings. But this is a problem that has long plagued administrative agencies

"... By far the most important sanction that Federal judges possess for violation of a discovery order is the contempt power. Although judges seldom have need to resort to use of this power to compel obedience to discovery orders, the fact that punishment for contempt of court is a possibility is undoubtedly a great deterrent against disobedience.

* * * * *

Absent the possession of court-like power to impose immediate fines or other penalties for contempt of its processes, there is little the Commission and its Law Judges can presently do to expediate compliance with a discovery order if the person to whom it is directed chooses not to cooperate. If that person is a party, or is representative of a party, the sanctions listed in § 3.38(a) [an adverse inference] may be available. However, if such sanctions would not be appropri-

⁸⁸ White, *FTC: Wrong Agency for the Job of Adjudication*, 61 A.B.A.J. 1242, at 1243 (1975).

ate and the information sought is deemed critical, court enforcement with its attendant delay is the only alternative.⁵⁷

In a complex matter where economic stakes are high, preliminary issues must be resolved before the case may proceed. Therefore, respondents who have the financial resources to do so can always seek Commission review, as the respondents in *Exxon* have done, with the result that action stalls until the Commission decides the issue.

Even more delay can occur when a respondent chooses not to comply with a Commission order requiring submission of documents. This may occur as a result of litigation over the subpoena request filed by complaint counsel on February 20, 1976, seeking access to oil company documents. If the Judge decides to issue this subpoena and the Commission concurs, the respondents may simply refuse to comply. The Commission may then seek subpoena enforcement of the subpoena by Federal district court. Even if the district court judge orders compliance, respondents may request a stay of that order pending appeal. Since the documents requested are obviously central to the preparation of the case against the oil companies, the action cannot proceed while this litigation continues. In contrast, a subpoena issued by a judge during a judicial antitrust proceeding ordinarily is not immediately appealable.⁵⁸

The second problem as noted concerns the Federal Trade Commission's dual role as both prosecutor and judge. The Commission issues a complaint because it has "reason to believe" that the law has been violated. The Commissioners, the staff, the respondents and the public know that the Commissioners may themselves be called on someday to decide these charges. Under the circumstances, the Commission is clearly open to the argument that it will always have a bias toward finding a violation once a complaint has been issued. The Subcommittee has found absolutely no indication that any such bias exists. But the tension created by such a dual role could lead to a public perception of an inconsistent position, thereby reducing FTC's credibility, status, and effectiveness.

The Commission's awareness of a possibility of bias could in fact incline it to lean the other way. In a close decision, the Commission may decide against its own staff merely to counter the belief that it prejudices its complaints.

Another result of this dual role is the Commission's inability to receive much management information on a case once it has entered ad-

⁵⁷ Letter to Honorable John E. Moss, Chairman, Subcommittee on Oversight and Investigations from Honorable Calvin J. Collier, Chairman, Federal Trade Commission, June 16, 1976.

⁵⁸ "Ordinarily a respondent or third-party witness will comply with Commission discovery orders. But when confronted with a balky witness, the Commission must apply to a Federal district court for an order directing the witness to comply if it continues to seek production of the information. If the judge determines that the demand is valid, he will order compliance—although sometimes on terms different from those laid down by the Commission. This does not necessarily end the matter, however. A judicial order enforcing a Commission subpoena (or other Commission compulsory process) is regarded as a final appealable order. *Ellis v. ICC*, 237 U.S. 432 (1915); *United States v. McDonald*, 313 F.2d 832 (2d Cir. 1963). If the witness persuades the court to stay its order pending appeal, more time is consumed in the process of appeal. In this respect, the witness is in an advantageous position compared to a person who has been ordered by a judge to answer demands put to him by a grand jury or in the course of judicial trial. No immediate appeal is ordinarily allowed from an order commanding compliance with grand jury subpoena or court subpoena issued during the course of a trial. *Cobbledick v. United States*, 309 U.S. 323 (1940); *Borden Co. v. Sylk*, 410 F.2d 843 (3d Cir. 1969); *United States v. Fried*, 396 F.2d 691 (2d Cir. 1967). In such proceedings, a recusant witness may seek appellate review only after he has been held in contempt. Obviously this precondition tests the sincerity of witnesses resisting discovery orders." *Id.*

judication. This happens because of its prohibition against *ex parte* communications, contacts with only one side in a controversy.⁸⁰ Thus, while the Commissioners approve budget requests, they do so without knowledge of the many mid-litigation strategy decisions which are made. While this may not have proved a problem yet in the early stages of this case, the time may well come when lack of such information may be important.

(b) *Likely timetable for the case*

The *Erron* case has raised issues at the core of the continuing debate over national energy policy. The basic question is whether the petroleum industry is competitive. A corollary question is whether a prohibition upon owning more than one phase of petroleum production ("divestiture") would effectively promote competition.

Divestiture has been vigorously debated in the Congress and will probably continue to be. To the extent that the Commission's adjudication could produce useful information for the Congress, there is a clear interest in prompt proceedings. The difficulty is that the schedule depends largely upon the response to the oil companies. Owen M. Johnson, Jr., Director of the Bureau of Competition, commented at the Subcommittee's oversight hearings last spring that:

Mr. JOHNSON. I really don't have an answer to the time question. I suppose one could look at the history of major antitrust cases and make some deductions therefrom. The *Erron* case will be larger because of its theory, based upon the interaction of eight companies. It will involve a lot of documentation on joint ventures, exchange agreements, and that sort of thing. We have to show how these eight companies relate to each other.

Reference was made here today to the *IBM* case, where the complaint was issued in 1969 and the case is now at trial in 1976. You can look at these historical parallels and hope they are somewhat comparable, but the administrative law judge will control the progress of discovery in the *Erron* case. A lot of the timing is subject to his orders, subject to the respondent's reaction, and subject, quite probably, to court enforcement on certain aspects of our discovery. So we really can't come up with a figure.⁸¹

Probably the respondents will oppose the Federal Trade Commission's complaint vigorously. From the time the complaint was issued until the present, the oil companies have filed more than 100 motions on various discovery issues and other pre-hearing issues.⁹¹ Their response to the Motion for a Documents Subpoena (filed by the Commission staff on February 20, 1976) indicates that they will oppose by all legal means any effort of the Commission to obtain the internal company documents which are needed to prove the validity of the complaint. Litigation over that subpoena alone could last through-

⁸⁰ Under Section 4.7 of the Federal Trade Commission Rules: § 4.7 *Ex Parte* Communications—(a) In an adjudicative proceeding, no person not employed by the Commission, and no employee or agent of the Commission who performs any investigative or prosecuting function in connection with the proceeding, shall communicate *Ex Parte*, directly or indirectly, with any member of the Commission, or the Administrative Law Judge, or any employee involved in the decisional process in such proceeding with respect to merits of that or a factually related proceeding. (b) In an adjudicative proceeding, no member of the Commission, Administrative Law Judge, or employee involved in the decisional process of such proceeding, shall communicate *Ex Parte*, directly or indirectly, with any person not employed by the Commission, or with any employee or agent of the Commission who performs any investigative or prosecuting function in connection with the proceeding, with respect to the merits of that or a factually related proceeding.

⁸¹ Testimony of Owen M. Johnson, Jr., Director, Bureau of Competition, Federal Trade Commission, *Hearings supra* note 45, at 628-29.

⁹¹ See letter to Patrick M. McLain and Mark L. Rosenberg, Counsel, Subcomm. on Oversight and Investigations from David J. Saylor, Assistant Director for General Litigation, Bureau of Competition, Federal Trade Commission with attached list of motions in *Erron* litigation, March 10, 1976. [Subcommittee files].

out 1977 and perhaps into 1978. One can hardly estimate with confidence the amount of time that would be necessary to analyze those documents if and when they become available. The "Prehearing Schedule" submitted by the Commission staff in October, 1974, allocated 16 months to such analysis,⁹² an estimate which assumed that no other activities would be required of the allotted staff.

It is reasonable to assume that the analysis could continue into 1979, even if the Commission suffers no major reverses in court. After analysis of the documents, the complaint counsel plans to begin a third phase of discovery, the depositions. The October 18, 1974 procedural motion stated that "Ten months have been allotted for the extensive third wave of discovery. Complaint counsel expect to take from 500 to 700 depositions of respondent officials and employees, a process that will require great coordination of efforts to accomplish in less than one year."⁹³

That estimate assumed that there would be voluntary compliance with these depositions. In view of the intense opposition to the first-wave depositions, this assumption may not be sound, although it could be supported by other factors in the litigation.

The third wave of discovery, given no significant opposition, would likely take place during 1980. If opposed like the first-wave, respondents could probably delay action into 1982 or even 1983. On the basis of the respondent's actions so far, trial might not begin until 1985, even with no significant reversals.

It is impossible to set a time for the length of trial, the Judge's initial decision, the Commission's decision on review, or the expected judicial review. Even a preliminary decision on the issues may be many years, even decades away, despite the gravity of national interest in resolution of the issues. To the extent that the structure of the Federal Trade Commission and its Rules of Procedure account for the laggard pace of events, the structure and procedures must promptly be corrected.

(c) Deliberate delay by respondents

Numerous procedural and other motions submitted by the oil companies have done more than buy time for the respondents. Compared to the legal establishment of the oil companies, the staff resources of the Commission are modest. Therefore, any time spent responding to opposition motions leaves less time for preparing its case. Not only time but exhaustion favors the respondents.

It is extremely difficult, however, to distinguish between a legitimate procedural motion and a deliberate delaying tactic. We believe, however, that many of the more than 100 pretrial motions filed by respondents in the three years since the complaint was issued were without substantial legal basis and were filed partly for the purpose of delay. Respondents have taken full advantage of their ability to raise issues before both the Administrative Law Judge and before the Commission and they were aided in these tactics by the structure of the Commission and its procedures.

⁹² This schedule listed July 1, 1975, for commencement of second-wave discovery and October 1, 1976, for its conclusion. It is not clear what this was based upon, although it was certainly too early at that time to estimate the number of documents which would have to be reviewed. Motion of Complaint Counsel for Major Integrated Procedural Relief, October 18, 1974, at 64.

⁹³ *Id.* at 62.

Moreover, certain decisions of the Administrative Law Judges have contributed to the delay. The first Judge's decision in 1974 to force complaint counsel to pursue "voluntary methods" before he would issue a subpoena substantially protracted the first wave of discovery. The Subcommittee believes that this decision was inconsistent with both the intent of the Commission's discovery rules and with the public interest. Although the present Rules of Practice do require for a subpoena a showing "that such discovery could not be accomplished by voluntary methods . . ." ⁹⁴ it is obvious in the context of this case that the respondents are unlikely to yield sufficient information voluntarily.

The second Judge's submission to the Commission on October 17, 1975 (on his own motion) of his recommendation that the Commission consider withdrawing its complaint may also result in delaying this proceeding by encouraging the respondents to oppose the Commission. We believe that the Judge's action suggests prejudgment of the merits in a way which adversely affects the Commission's ability to resolve this case. The Subcommittee further believes that the Judge, in acting on his own motion, followed a course that is not appropriate to his supposedly impartial role.

3. Conclusions

(1) The *Exxon* case illustrates the difficulties of deciding a massive, complex antitrust case in an administrative forum. Neither the Administrative Law Judge nor the Commission has effective power to obtain necessary information efficiently in the course of such litigation. It is likely that the action would proceed with fewer delays in a Federal district court.

(2) It is doubtful that trial will commence before 1985, particularly if there is no change in the resistance by the oil companies.

(3) The respondents have taken full advantage of their ability to file dilatory pretrial motions. If they continue to do so, they will to that degree delay the eventual decision, possibly for decades.

4. Recommendations

It is our opinion that the tactics in the *Exxon* case will emerge in any major antitrust action by the Federal Trade Commission and perhaps in smaller cases. The "cereal case" (against Kellogg, General Mills, General Foods and Quaker Oats) ⁹⁵ and the American Medical Association ⁹⁶ are especially likely to encounter tactics like those used by *Exxon*. We believe that the Commission is entirely correct in bringing cases that cover a whole range of possibly anti-competitive practices within an entire industry. We regret that this policy may be severely hampered by the structure and rules of the Federal Trade Commission.

Therefore we recommend that the Congress consider legislation which would permit the Federal Trade Commission to file its antitrust cases in Federal district court. Filing in Federal district court would allow procedural and pretrial motions to be decided in one

⁹⁴ Federal Trade Commission, Rules of Practice, § 3.23, 16 CFR § 3.23. The Commission recently proposed new discovery rules which eliminate this "voluntary methods" requirement, 41 F.R. 21793 (May 28, 1976).

⁹⁵ Docket No. 8883. The complaint was issued in 1972 and trial began in April, 1976.

⁹⁶ Docket No. 9064. The complaint was issued on December 22, 1975.

forum, the district court, rather than by the Administrative Law Judge, then the Commission, and, third, a Federal Court of Appeals via judicial review. The Commission's dual role as prosecutor and judge would be eliminated. The difficulty of conducting complex pre-trial discovery would be reduced because of the availability of meaningful sanctions in the district court. The Subcommittee believes that such legislation would substantially improve the ability of the Federal Trade Commission to carry out its Congressional mandate.

Meanwhile, we recommend that the Commission undertake rule changes to resolve the issues in the *Exxon* case as rapidly as possible. As its Rules of Practice, which were designed for small antitrust cases, may be inadequate for resolving industrywide actions, the Commission should consider other Rules of Procedure for exceptional cases. If the Commission believes that its statutory powers are not sufficient to expedite this litigation, it should so inform the Congress and should recommend corrective legislation.

B. SELECTING PRIORITIES FOR CONSUMER PROTECTION—THE NEED FOR A BETTER SYSTEM

We have noted above that the Federal Trade Commission formerly concentrated its limited resources on cases of modest economic scope.⁹⁷ Prior to the passage of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act,⁹⁸ the major method used by the Bureau of Consumer Protection to enforce the Federal Trade Commission Act was to bring a complaint against the alleged individual violator. Since the passage of the Magnuson-Moss Act, there is an indication that the specifically affirmed power to engage in "rulemaking" will be a more major, if not the dominant, method of enforcing the Federal Trade Commission's mandate to protect consumers. In a statement to the Subcommittee on Oversight and Investigations, Chairman Calvin Collier noted that "the Act has prompted the Commission to shift substantial resources away from case-by-case adjudication and into rulemaking."⁹⁹

Undoubtedly, rulemaking will enhance the Commission's effectiveness. First, the Commission may use its resources to make rules for an entire industry or consumer problem in a single rulemaking proceeding rather than bring a number of cases against individual offenders. Second, by making general rules, the Commission may provide better guidance for vendors than when it adjudicates only specific cases.¹⁰⁰

An important decision which the Commission must address is the extent of the use of rulemaking. However, the critical question at present, whatever enforcement method is used, is the choice of target industries and consumer problems. For this choice, the Commission has not yet developed a systematic approach.

Historically, the Bureau of Consumer Protection's selection of possible cases or areas for investigation has favored two methods:

(1) The "mailbag" approach, that is, reliance upon letters from the public, from industry and from the Congress.

⁹⁷ See sources cited in note 16, *supra*.

⁹⁸ Pub. L. 93-637, 15 U.S.C. 2301, approved January 4, 1975.

⁹⁹ Testimony of Calvin J. Collier, Chairman, Federal Trade Commission, *Hearings supra* note 45, at 519.

¹⁰⁰ See Section III(C) of this Chapter, *infra*, for a discussion of the rulemaking versus adjudication in the land sales and vocational schools programs.

(2) A self-starting approach, perhaps based on research or the personal knowledge of staff members.

The Commission's procedure for beginning an investigation is relatively simple. The first step is the issuance of a Memorandum Initiating an Investigation (MII) by an Assistant Director of the Bureau of Consumer Protection or by a Regional Director.¹⁰¹ An investigation in this stage is known as a "Preliminary Investigation." It is an informal evaluation of the desirability of a full investigation. Often, an MII follows the suggestion of a staff attorney that a particular investigation is warranted.

If the preliminary investigation indicates that a subject deserves investigation, a "formal investigation" (or "seven-digit investigation") may be opened. "Seven-digit" refers to a file number with seven digits assigned to the matter. A seven-digit investigation is launched also at the discretion of an Assistant Director in the Bureau of Consumer Protection or a Regional Director.¹⁰² At this point normally an "investigational subpoena" is issued by the Assistant Director or Regional Director¹⁰³ for documents or testimony. The Commissioners themselves first become aware of the proposed formal investigation when someone objects. A motion to quash the investigational subpoena must be ruled upon by the Commission itself.¹⁰⁴

1. Recent changes in resource allocation

The Commission has introduced certain changes in its planning procedures which seem constructive. The first consists of program budgeting and a requirement that manpower and other operating costs be estimated when a complaint is recommended.¹⁰⁵ This process should provide useful information on the deployment of staff resources for review by Commissioners, the Executive Director, the Bureau Directors, and Assistant Directors.

A second change was creation in January, 1976, of an Evaluation Committee in the Bureau of Consumer Protection, under direction of a Division of Evaluation.¹⁰⁶ The memorandum which created the Division of Evaluation described its functions as follows:

The purpose of creating a Division of Evaluation was to ensure that, on an individual case basis as well as program-wide, consumer protection matters are generating the greatest possible consumer benefits relative to costs.

The Division's functions will include developing new programs, monitoring existing programs, and analyzing the effectiveness of completed programs. These activities should provide information crucial for the development of long-term planning capabilities and for the strengthening of the Consumer Protection Mission through the institutionalization of cost/benefit and resource-use analysis where appropriate at every major stage of program development and execution.¹⁰⁷

¹⁰¹ Pursuant to delegated authority under Section 2.1, Procedures and Rules, Federal Trade Commission.

¹⁰² *Id.*

¹⁰³ Pursuant to the delegation of authority in Section 2.7(a) of the Federal Trade Commission Rules, 16 CFR Part 2.

¹⁰⁴ Section 2.7(b) of the Federal Trade Commission Rules, 16 CFR Part 2.

¹⁰⁵ See Federal Trade Commission response to question 49, Subcommittee questionnaire of June, 1975. [Subcommittee files].

¹⁰⁶ The Bureau of Competition has had an Assistant Director for Evaluation for several years.

¹⁰⁷ Memorandum to Staff of the Bureau of Consumer Protection and Regional Offices, Federal Trade Commission, from Joan Z. Bernstein, Director, February 24, 1976, at 3. The Evaluation Committee consists of seven members: the Assistant Director for Evaluation, the Deputy Assistant Director for Evaluation, the Deputy Director of the Bureau, the Assistant to the Bureau Director, and three by rotation (an economist, a Bureau Assistant Director and a Regional Director).

2. Use of regional office resources in consumer protection

A significant portion of the staff resources of the Bureau of Consumer Protection is located in the 11 Commission Regional Offices¹⁰⁸ and one "Field Station."¹⁰⁹ These offices currently have 390 of the 1,678 employees of the Commission¹¹⁰ and during fiscal 1976, they spent approximately 40 percent of the resources of the Bureau of Consumer Protection.¹¹¹ Therefore any discussion of the proper use of resources in the Bureau of Consumer Protection must recognize the importance of the staff resources in the Regional Offices.

Since the founding of the Federal Trade Commission, Regional Office employees usually have served only as investigators for the Bureaus, primarily the Bureau of Consumer Protection. As a result, the Regional staffs did not develop the expertise necessary to prepare cases.

In the early 1970's, the Regional Offices were given authority to originate investigations, to issue investigational subpoenas, and to recommend complaints directly to the Commission. They were further encouraged to expand their activities into Bureau of Competition matters. As the Regional Offices have begun to extend their duties, however, the Commission has not been clear about what they are *supposed* to do. As most Regional Offices have concentrated on rather local matters, the economic effects are limited. Some Regional Offices have begun to investigate cases of national scope,¹¹² to a limited extent.

Coupled to this lack of direction for the Regional Offices is the Commission's failure to address the single most important question concerning their operation: How large should they be in relation to the total Commission staff? The Subcommittee finds that a disproportionate amount of Bureau of Consumer Protection resources may be concentrated in the Regional Offices and these resources are often spent on matters of relatively minor economic consequence.¹¹³

In an attempt to restructure the relationship of the Regional Offices to the Bureaus, Chairman Lewis Engman, on December 31, 1975, abolished the position of Assistant Executive Director for Regional Operations. This official's function had been to coordinate and approve all Regional Office matters for submission to the Commission. As a result of this change, the Regional Offices report to Program Directors on the Bureau staff and ultimately to the Bureau Directors. Perhaps this new system will help to coordinate Bureau priorities with Regional

¹⁰⁸ Atlanta, Boston, Chicago, Cleveland, Dallas, Denver, Los Angeles, New York, San Francisco, Seattle, and Washington, D.C.

¹⁰⁹ Honolulu. A second field station in Kansas City was closed as of July 16, 1976.

¹¹⁰ Staff telephone conversation with Jack Duggan, Assistant to the Executive Director, Federal Trade Commission, Sept. 1, 1976.

¹¹¹ Federal Trade Commission, Program Budget Justification to Congress, Fiscal Year 1977, at 5 (1976 Resource estimates).

¹¹² The Seattle Regional Office was criticized for an investigation of the house plant industry. Federal Trade Commission Investigation of the Nursery and House Plant Industry. *Hearings Before the Subcomm. on Federal Spending Practices, Efficiency and Open Government of the Sen. Comm. on Government Operations*, 94th Cong., 2d Sess., December 4, 1975, and March 4, 1976.

¹¹³ The Subcommittee intends no criticism of the Regional Office employees themselves; they operate within the system which the Commission has created.

Office activities. In any event, the Commission must still decide what proportion of its resources should be in Regional Offices. It must determine in its judgment where these resources can be deployed most effectively.

Our concern with the effective use of these resources is consonant with the analysis by the Commission's Office of Policy Planning and Evaluation, a semi-annual critique of present programs. In its January 1976 analysis of the Bureau of Consumer Protection, it bore down on Regional Office plans and policies: e.g. regarding the Advertising Monitoring and Substantiation Program, the Office commented that:

Approximately 30 percent of the resources usage in this program has been used by the regional offices to prosecute cases of dubious public interest.¹¹⁴

As to Affirmative Disclosure of Material Product Information, the Office noted that:

No Regional Office activities were expressly planned for this program; nonetheless, there is a raft of cases and investigations.¹¹⁵

Overcommitment of resources was a problem in at least one area: Textile, Wool and Fur Labeling. The Office found that:

Resource usage is running about forty percent over the plan approved by the Commission [for the program]. If the Commission's resource allocation decisions are to have any meaning a serious effort must be made in the regional offices to reduce expenditures here.¹¹⁶

3. Future planning and priorities

The most serious deficiency in the Bureau of Consumer Protection's resource allocation is its failure to plan where future resources should be placed. The Commission apparently believes that there are *no* industries or consumer protection problems which are not now under consideration. In response to the Subcommittee's question, the Commission stated that:

The Commission is constantly on the alert for remediable consumer protection problems. As quickly as it is able to identify those problems, it addresses them. Accordingly, there is no backlog or inventory of problems of which the Commission is aware, which it feels can solve, and which are not being addressed.¹¹⁷

It is not clear that the Commission has any data upon which to base its conclusion. In response to our question, "How does the Federal Trade Commission assemble a data base for determining what areas or industries not now being reviewed are most likely to have consumer protection problems?" the Commission said that it "does not assemble what could be referred to as a data base".¹¹⁸ Even if the Commission is aware of every consumer protection problem, it does not appear to have any systematic method for both determining the relative importance of these problems and for ensuring that its commitment of staff resources reflects these priorities. It is therefore unable to plan realistically so as to direct available staff to investigate practices which the Commission believes should receive prompt attention.

¹¹⁴ Federal Trade Commission, Program Budget Mid-Year Review, January, 1976, Vol. II, Program 101, at 4.

¹¹⁵ *Id.*, Program 111, at 7.

¹¹⁶ *Id.*, Program MO4, at 1.

¹¹⁷ Letter to Honorable John E. Moss, Chairman, Subcommittee on Oversight and Investigations from Calvin J. Collier, Chairman, Federal Trade Commission, June 9, 1976, reprinted in *Hearings*, *supra* note 45, at 644-51.

¹¹⁸ *Id.*

The result is that individual staff professionals may generate new investigations without knowledge of the Commission's true priorities. These ideas may actually match the priority list. The investigator must show that its possible benefits outweigh the investigation's costs. Such ideas usually are evaluated with respect to other *current* proposals, but are *not* measured against project that are possibly more important for future programs because the Commission has failed to determine what its future emphasis should be.

Because they are primarily occupied with local situations, the Regional Offices, though they depend on Program Directors in Washington to allocate staff for each program, cannot in actuality, transfer staff from one to another priority without advance preparation.

The Commission should seek to develop a system that will define future priorities, so as to identify projects of which will receive the first call on available resources. It would perhaps be helpful to conduct periodic, surveys of consumers to obtain data for such plans and as a basis for priorities.¹¹⁹

4. Recommendations

(1) The Commission should determine which specific areas, industries, or problems warrant future emphasis. The Commission should permit no significant commitment of staff to any but planned activities. It should require proposals for new investigations to conform to accepted future priorities.

(2) The Commission should convert the resources of its Regional Offices to operations in major consumer protection areas which warrant the most attention.

(3) The Commission should delineate clearly the future role of the Regional Offices. Their major functions should be liaison and cooperation with State and local consumer protection agencies and citizens groups as well as initiation of administrative cases when, and *only* when, those cases are rated significant in the scale of Commission priorities.

C. THE CHOICE BETWEEN ADJUDICATION AND TRADE REGULATION RULES

Section 5 of the Federal Trade Commission Act ¹²⁰ prohibits "unfair methods of competition" and "unfair and deceptive acts and practices" and describes the manner by which the Commission enforces violations of this section. These adjudicative proceedings are similar to a judicial proceeding: upon issuance of a complaint, the parties have a right to appear at a hearing, and, after weighing evidence and argument, the Commission issues an order. Under Section 5, respondents may challenge a final Commission order in the United States Court of Appeals. In addition to adjudication, the Commission has defined its policy of consumer protection by issuing Trade Regulation Rules. A Trade Regulation Rule defines industry-wide acts or practices which are unfair or deceptive. It forbids such acts, which affect an entire industry, with the same force as a Commission order or a statute.

¹¹⁹ *Id.* One such survey was considered in 1973 but was never carried out because of lack of money and concerns about its usefulness.

¹²⁰ 15 U.S.C. 45.

In 1963, the Commission issued its first Trade Regulation Rule. It applied to the advertising and labeling of sleeping-bags.¹²¹ In 1971, the Commission's authority to issue industrywide rules was challenged. The test case concerned gasoline octane ratings. In 1973, the United States Court of Appeals for the District of Columbia upheld the Commission's authority to issue the octane rule and other TRRs.¹²² On January 4, 1975, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act,¹²³ Title II, affirmed the authority of the Commission to act by Trade Regulation Rule. The Act also sets new procedures for the Commission in such proceedings.

The Commission's decision whether to proceed by case or with a trade regulation rule necessarily depends on many factors, including the incidence of the past violations, the effectiveness of a rule, and prior adjudications. Review of its activities in consumer protection indicates, however, that the Commission has not assigned to rule-making resources sufficient to ensure that substantive regulation rules are issued as quickly as possible.¹²⁴ Instead, the Commission has continued to employ administrative action for certain consumer protection cases, an uneconomic use of staff resources.

Its actions on vocational schools and land sales programs demonstrate the flaws in this policy, as the following tables indicate.

¹²¹ 16 CFR 400.

¹²² *National Petroleum Refiners Association v. FTC*, 340 F. Supp. 1343 (D.D.C. 1972), *aff'd*, 482 F.2d 762 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

¹²³ Pub. L. 93-637, 15 U.S.C. 2301.

¹²⁴ The Commission has been criticized for extensive delays in rulemaking. See *Hearings on the Federal Trade Commission Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, March 20, 1976.

LAND SALES ¹²⁵

[Time period: 1st half fiscal year 1976]

Activity summary	Preliminary investigations			Formal investigations			Part III				
	Pending end of period	Opened during period	Closed recommending formal investment	Pending end of period	Opened during period	Closed recommending complaint	Consent orders issued	Complaints issued	Orders issued	Matters pending	Projects pending
Fiscal year 1975.....	5	16	3	21	7	2	1	2	2	2	2
1st half fiscal year 1976.....	3	3		23	4	1		1	1	3	

¹²⁵ Federal Trade Commission, "Program Budget Mid-Year Review," January 1976, vol. I, program JO.4.VOCATIONAL SCHOOLS ¹²⁶

[Time period: 1st half fiscal year 1976]

Activity summary	Preliminary investigations			Formal investigations			Part III				
	Pending end of period	Opened during period	Closed recommending formal investment	Pending end of period	Opened during period	Closed recommending complaint	Consent orders issued	Complaints issued	Orders issued	Matters pending	Projects pending
Fiscal year 1975.....	8	24	1	19	6	7		3		6	2
1st half fiscal year 1975.....	4	3	2	16	3	4	3	1	1	6	2

¹²⁶ *Id.*, program JO.2.

In the vocational schools program, rulemaking proceedings have been pending since August, 1974. Nevertheless, the Commission has continued to open investigations (both preliminary and formal) and has continued to issue complaints and approve consent orders. Undoubtedly, these enforcement activities have discouraged the offending practices. Nonetheless, such continuing diversion of staff resources retards the rulemaking proceeding.

In its January 1976 review, the Office of Policy Planning and Evaluation commented on the vocational schools program that:

[a]ctual accomplishments have fallen far short of plan, which included final promulgation of the TRR for this year. Giving the most generous interpretation possible to the staff time reports, only 26 percent of the time spent in this program has gone to rulemaking. Only about 9 percent of recorded time has been spent by the Bureau on rulemaking. The remaining 74 percent has gone to litigation.¹²⁷ . . .

As yet, no rulemaking is pending on land sales. But the Office of Policy Planning and Evaluation has recommended that a rule would be much more effective, stating in January 1976 that

[u]nfortunately, Bureau resources are almost exclusively devoted to the selection and litigation of cases appropriate for consumer redress. Litigation has proved a costly method of achieving the wanted objective . . . [a]lthough rulemaking was planned, the Bureau now claims that it has no time for it, due to the tremendous efforts being devoted to litigation. We do not see how the Commission will ever get out of the land sales business if the Bureau continues to use the current strategy. Of course, aside from the terrific costs, that strategy is often hampered by the insolvency of the firm investigated.¹²⁸

The policy planners believe that a rule requiring disclosures in the land sales area would be cost-effective and would prevent many frauds, and reduce consumer complaints. Mark F. Grady, Acting Director of the Office of Policy Planning and Evaluation testified before the Subcommittee that:

We thought that many of these cases seek to redress harm that could have been prevented if the circumstances were merely disclosed to consumers prior to the time that they entered into the contract. To the extent that here could be a better disclosure which might be required by a rulemaking, then the occasion for litigation would be reduced.

As a consequence, our recommendation was that rulemaking be given priority even if it would require some present reduction in the number of cases.¹²⁹

The Commission has testified that administrative cases on land sales serve a good purpose. Chairman Collier told the Subcommittee that:

I think some of those cases involve situations where a rule which has a prospective effect just simply won't achieve everything Congress may have intended us to achieve with the redress authority, for example, in a situation where the law is neither mysterious nor unclear would it be unfair to invoke it in a particular case. This would occur if we only rely on putting out a new rule. I think that would simply be an instance of the Commission doing exclusively on a prospective basis that which Congress indicated in this legislation should not be restricted to only prospective efforts. And I think that may account for the number of individual matters that happen to be pending in the land sales area in particular. Losses to consumers are not insignificant, the rules of law are not all that complex and individual cases may be the best way to remedy problems in that industry as well as to do individual justice.¹³⁰

¹²⁷ *Id.*, Program JO2, at 1. (Footnotes omitted.)

¹²⁸ *Id.*, Program JO4, at 1.

¹²⁹ *Hearings*, *supra* note 45, at 641.

¹³⁰ *Id.* at 640-41.

We agree that, in certain circumstances, administrative cases are useful in achieving consumer redress in fraudulent land sales. However, the Commission should give serious consideration to the development of a rule. The Commission should further consider whether continued occupation with adjudicating individual cases will deny staff the time and opportunity to develop a rule.

We agree with Commissioner Paul Rand Dixon, then Acting Chairman, who wrote to Congressman Rosenthal, Chairman of the House Government Operations Subcommittee on Commerce, Consumer and Monetary Affairs on March 10, 1976, that:

Rulemaking allows clear enunciation of agency policy and fair warning of the consequences to be imposed on individual conduct on an industrywide basis. In this way, it minimizes the uncertainty fostered by a case-by-case approach. Use of agency rulemaking is also advantageous in that it limits the scope of litigation by more clearly prescribing the behavior of regulatory subjects.¹³¹

Recommendations

(1) The Commission should declare a moratorium on new administrative cases or investigations in the vocational schools area until the proposed rules are either issued or withdrawn.

(2) The Commission should direct the Bureau of Consumer Protection to analyze the possible effectiveness of a disclosure rule in the land sales area.

(3) If the Commission issues a proposed rule on land sales, it should direct that new administrative cases and investigations in the field be limited to situations where consumer harm is significant and where the financial status of the alleged violator indicates that consumer redress will be possible.

(4) The Commission should assess other areas where rulemaking has been delayed to determine whether delays have been caused by the continued opening of new cases. It should order a moratorium on new cases where appropriate.

D. OBSTACLES TO INFORMATION—THE LINE-OF-BUSINESS PROGRAM

Section 6(b) of the Federal Trade Commission Act¹³² provides investigatory powers for the Federal Trade Commission. It grants to the Commission authority:

To require, by general or special orders, corporations engaged in commerce, . . . to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. . . .

The gathering of information as contemplated by the Congress in enacting Section 6 is essential to the Commission's ability to discharge its duties. Trade data are needed for the Commission to fulfill its anti-trust and consumer protection responsibilities and to provide a sound base for analyzing trends and projecting plans. In the past, the Commission has been frustrated in its information-gathering function,

¹³¹ Letter to Honorable Benjamin S. Rosenthal, Chairman, Subcomm. on Commerce, Consumer and Monetary Affairs, House Comm. on Government Operations, from Paul Rand Dixon, Acting Chairman, Federal Trade Commission, March 10, 1976.

¹³² 15 U.S.C. 46.

either through dilatory tactics by respondents or by a lack of enforcement powers sufficient to acquire critical information. The Commission's Line-of-Business reporting program illustrates the potential for extended delays.

The Line-of-Business program seeks to gather sales and profit information from major manufacturing companies product-by-product. Such information helps to identify less competitive industries as prime targets for antitrust actions. The program also collects data on expenditures for advertising and research by industries. Such data, in aggregate, may help new competitors to enter markets and encourage older firms to expand where demand is strong and profits high. The data can be useful also to economic analysis and investors in common stocks.

The Line-of-Business program has been the object of intense controversy and criticism among business leaders since its initiation in 1973. However, the program was specifically authorized by both Houses of Congress in a 1973 appropriations bill.¹³³ Moreover, the Commission regards the program as critical. Chairman Collier told the Subcommittee in March, 1976, that:

We have also moved forward with the line of business reporting program, which we regard as one of our most important efforts. This vital program will eventually provide regularly published aggregate data which should be of significant assistance in formulating general economic policy, both public and private.¹³⁴

Comments on the Commission's enforcement authority are pertinent to this issue. Prior to enactment of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act,¹³⁵ the Commission did not have independent authority to institute proceedings to enforce its own process. It could only request the Department of Justice to initiate proceedings. The Attorney General was responsible for the prosecution. Since January 4, 1975, the effective date of the Magnuson-Moss Act, the Commission has had the right to institute and prosecute summary proceedings to enforce subpoenas and Section 6(b) orders demanding information, although the Department of Justice still retains sole responsibility for civil penalty actions in the event of noncompliance with these orders. (Section 10 of the Federal Trade Commission Act¹³⁶ provides such civil penalties for noncompliance with section 6(b) requirements for annual or special reports. A corporation can be held liable in the sum of \$100 a day for noncompliance if it fails to file the required report at the time fixed by the Commission and that failure continues for 30 days after notice of default.)

After review and clearance by the General Accounting Office, the Commission sent the first Line-of-Business questionnaires on August 15, 1974, to 345 of the country's largest manufacturing firms. This survey covered information based on Fiscal Year 1973 for 219 manufacturing and 9 nonmanufacturing categories. Companies were given 150 days to complete and return their questionnaires. Of the 345 addressed, 228 companies filed the questionnaires; 117 did not.

¹³³ Pub. L. 93-563.

¹³⁴ *Hearings*, *supra* note 45, at 548.

¹³⁵ Pub. L. 93-637.

¹³⁶ 15 U.S.C. 50.

In 1975, the Commission brought suit against 106 of the 117. On their part, 108 companies brought actions to enjoin enforcement of the order, 14 in Delaware and 94 in the Southern District of New York. Their actions forced the Commission to litigate the same issues in different courts, no small burden on its staff.

In due course, the Commission requested 1974 data and again was challenged: 276 companies of the more than 400 questioned now seek to enjoin enforcement of the Commission's order: 49 in Delaware and 227 in New York.

In addition, because many companies not in compliance with the 1974 Line-of-Business order were not subject to pre-enforcement litigation, the Commission had to initiate its own enforcement proceedings. As it was already involved in litigation in two different courts, the Commission decided to proceed against all those in default on the 1974 orders in the District of Columbia, where the reports are due, and where the claims arise.

Because of the burden of litigation on the same issues in three different courts, the Commission decided on April 20, 1976, to withdraw its orders against those who had not complied with the 1973 Line-of-Business form, but to seek enforcement of the more comprehensive 1974 form. On May 12, 1976, such enforcement proceedings were brought in the District of Columbia.

This litigation is still pending. This situation illustrates how the Federal Trade Commission can be delayed if not totally frustrated in its efforts to obtain information which is vital to carrying out its statutory mandates.

This problem was acknowledged by Commission Chairman Collier who has stated that:

The number and burden of pre-enforcement challenges to the Commission's compulsory process has increased dramatically in recent years. These problems are exacerbated when a number of companies challenge essentially identical process in different courts.¹⁸⁷

It is clear that new legislation is needed to revise procedures by which the Commission enforces its subpoenas and other orders for economic and special reports. The Subcommittee recommends legislation similar to that now pending before the Congress, Senate Bill 642.

The recommended legislation would provide several changes in the existing process:

- (1) It would limit the issues in pre-enforcement suits to the serious issues at the heart of the Commission process;
- (2) It would make penalties, in amounts sufficient to deter frivolous challenges, applicable to both subpoenas and other Commission orders;
- (3) It would confine petitions for review of final Commission orders to the United States Court of Appeals in the circuit where a respondent resides or maintains his principal place of business;
- (4) It would require the Commission's issuance of a formal notice of default, and notice of intent to collect penalties, before permitting a court challenge to the Commission's process.

¹⁸⁷ *Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, March 20, 1976, at 1-12.

Conclusion

The Federal Trade Commission must obtain necessary information on a timely basis in order to carry out its law enforcement and regulatory functions. The opposition to the Line-of-Business program is characteristic of the many methods of frustrating the Commission's information-gathering function. We believe that legislation, similar to that contained in the proposed Federal Trade Commission Amendments bill (S. 642) now before the House Committee on Interstate and Foreign Commerce, is needed. Such legislation can significantly reduce solely dilatory challenges to the Commission's compulsory process while retaining sufficient protection to parties who object in good faith with legitimate reasons for noncompliance.

E. INADEQUATE USE OF INJUNCTIONS

Effective implementation of the Federal Trade Commission's mandates often requires that it be able to react quickly to prevent violations of the Federal Trade Commission Act or the Clayton Act. For example, if the Commission discovers an advertisement which appears to violate the Federal Trade Commission Act, an administrative action against the alleged offender may often take longer than the advertising campaign. Therefore, a cease-and-desist order, while it would prohibit future similar advertisements, would not prevent the offensive advertisement itself. If a merger is proposed which may violate the Clayton Act by substantially reducing competition, by the time an administrative action has been completed, the merger will probably be consummated and the companies will have been operating together for some time. Although the Commission could order a divestiture if it finds a Clayton Act violation, it will be much more difficult to dissect the merged corpus.

Recognizing this need, the Congress enacted on November 16, 1973, an amendment to Section 13 of the Federal Trade Commission Act which substantially broadened the authority of the Commission to seek temporary restraining orders, preliminary injunctions, and permanent injunctions.¹³⁸ Formerly, the Commission had been limited to seeking injunctions for false advertising of food, drugs, medical devices or cosmetics.¹³⁹ The new Section 13 of the Act allows the Commission to seek an injunction in a Federal district court whenever it has reason to believe that any statute under its jurisdiction is being violated or is about to be violated.¹⁴⁰

¹³⁸ This amendment was part of the Trans-Alaska Pipeline Authorization Act, Pub. L. 93-153, 87 Stat. 591 and was contained in Section 408 of the Act.

¹³⁹ Previously Section 13 had related only to suspected violations of Section 12 of the Federal Trade Commission Act.

¹⁴⁰ Section 13(b) of the Federal Trade Commission Act now reads as follows:

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public.

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

Despite early expectations that it would use this authority "aggressively," the Commission has failed to exercise this new power sufficiently. Several court decisions have interpreted the new authority narrowly and, we believe, inconsistently with Congressional intent. However, the Commission has failed to employ its injunction powers further in an effort to counter the unfavorable court decisions.

Shortly after the amendment was passed, the Commission set up a task force to develop guidelines for the use of the new injunction authority.¹⁴¹ The task force, on December 21, 1973, recommended that injunctions be sought where the injury was clear, the legal theory was *not* novel, and the issuance of an administrative complaint on the type of violation had not been sufficient to halt the challenged practice in the past.¹⁴² A major recommendation of the task force was that "[t]he general policy of the Commission should be to use the injunction authority aggressively. Except as indicated by the other, more specific guidelines, the presumption should be in favor of seeking injunctions in every case within the limits of Commission resources."¹⁴³ Despite the task force's recommendation that the injunction power be used "aggressively," as of September 1, 1976 (almost 3 years after enactment of its broadened authority), the Commission has attempted to obtain an injunction under new Section 13(b) of the FTC Act only seven times.¹⁴⁴

We believe that the court decision in one major suit, *FTC v. Simeon Management Corp.*,¹⁴⁵ is inconsistent with the Congressional intent in Section 13(b). That decision has severely and unduly inhibited the Commission's use of its injunction power. The remedy awaits further judicial decision or Congressional action.

In the *Simeon* case the Commission sought to enjoin Simeon from advertising representations of a weight reduction program which included treatment with a drug which had not been approved by the Food and Drug Administration. The Commission alleged that the advertisements were false and deceptive because the advertisements asserted that the treatment was safe while proof of the drug's safety was absent. Also the advertisements failed to state that the treatment was based on injection of a drug which was not recognized as safe or effective.

The district court declined to issue the injunction on the basis that the Commission failed to establish a strong likelihood of success in the administrative proceeding on the facts alleged and the Ninth Circuit Court of Appeals affirmed the decision. Both courts used a traditional equity standard for deciding on the injunction: likelihood of success and irreparability of harm.

¹⁴¹ Chairman Engman suggested the creation of a task force in his memorandum to the Commission on November 23, 1973. The action was approved by the Commission on December 4, 1973. The task force was under the direction of the General Counsel (now Chairman), Calvin J. Collier, and consisted of members from the operating bureaus, Regional Offices, and the Office of Policy Planning and Evaluation.

¹⁴² Memorandum to the Federal Trade Commission from Task Force on Injunction Guidelines, December 21, 1973, at 7-8 [Subcommittee files].

¹⁴³ *Id.* at 7 (footnote omitted).

¹⁴⁴ See letter, *supra* note 117, at response to Question D. *Hearings supra* note 45, at 647-49. The seventh injunction action was filed on August 6, 1976 in *FTC v. Food Town Stores, Inc.* The District Court denied the injunction but the Court of Appeals reversed the District Court on August 11, 1976. *FTC v. Food Town Stores, Inc.*, 1976-1 Trade Cases § 61,031 (4th Cir. 1976).

¹⁴⁵ 391 F.Supp. 697 (N.D. Cal. 1975), *aff'd* 532 F.2d 708 (9th Cir. 1976).

Such a standard was expressly rejected by the Congress when the new power was granted. The conference report stated:

The intent is to maintain the statutory or "public interest" standard which is now applicable, and *not* to impose the traditional "equity" standard of irreparable damage, probability of success on the merits, and that the balance of equities favors the petitioner. This latter standard derives from common law and is inappropriate for the implementation of a Federal statute by independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief.¹⁴⁶

The imposition of such a standard would, in the opinion the Subcommittee,¹⁴⁷ make it unduly difficult for the Commission to obtain injunctions. The more appropriate test is the "public interest" standard with the courts giving great deference to the Commission's judgment on the need for an injunction. The language of the *Simeon* decision and the standard which it imposed appears to have reduced the incentive of the Federal Trade Commission to seek injunctions.

A second judicial interpretation which appears inconsistent with the Congressional intent relates to the availability of injunctive relief when monetary injury to consumers is alleged. The broad language of the amendment to Section 13 as well as the rejection of the traditional equity standard indicates that an injunction was to be granted where monetary injury was likely. Regrettably, on those few occasions when the Commission has sought injunctions "[w]here purely monetary injury has been alleged (e.g., *Idea Research and Development*), the Commission has not been generally successful, and this is probably the type of case which the courts will scrutinize most closely."¹⁴⁸ As the Commission has not attempted to modify unfavorable judicial opinions by aggressively seeking injunctions in a variety of situations, it has failed to exploit a power which could benefit both consumers and honest businessmen.

Recommendations

(1) The Commission should file injunction petitions in all appropriate cases in order to obtain court decisions which recognize the Congressional intent in enacting new Section 13(b).

(2) If it becomes clear that the Federal courts will continue to misinterpret the legislative history and to apply the *Simeon* standards in Section 13(b) cases, the Commission should recommend, and the Congress should enact clarifying language. Injunctions should be granted whenever the Commission's belief that the law has been violated (or is about to be violated) is reasonable and the courts should generally defer to that judgment.

F. NATURAL GAS RESERVES INVESTIGATION

The "natural gas reserves" investigation¹⁴⁹ at the Federal Trade Commission is significant for several reasons. First, it demonstrates

¹⁴⁶ H. R. Rep. No. 93-624, 93d Cong., 1st Sess., 31 (1973).

¹⁴⁷ Letter, *supra*, note 117, at response to Question D. *Hearings, supra* note 45, at 648.

¹⁴⁸ *Id.*

¹⁴⁹ The Subcommittee on Oversight and Investigations has been generally concerned, since the beginning of the 94th Congress, with the issue of the nation's supply of natural gas. Several investigations have been conducted of various aspects of this matter. See *Preliminary Staff Report Concerning Delays in Natural Gas Production by Cities Service Oil Company, Natural Gas Supplies: Declining Deliverability at Garden City, La.; Natural Gas Supplies: Declining Deliverability at Bastian Bay Field, La.; Mobil Oil Corporation: Failure to Deliver Natural Gas to the Interstate Market; Natural Gas Supplies Hearings*, Vols. I, II, III [hereinafter cited as *Natural Gas Hearings*].

how large corporations can delay an investigation by refusing to provide information. Second, it illustrates how FTC procedures are disturbed when one Bureau ventures beyond its areas of competence in commenting upon a recommended complaint. And third, it reflects a flaw in the Commission's rules on *ex parte* communications (contacts with one side in a controversy) with the Commissioners which impairs the Commission's image of impartiality.

The Federal Trade Commission's investigation of the natural gas reserves reporting system began in late 1970 at the suggestion of Senator Philip A. Hart.¹⁵⁰ Senator Hart suggested that the Commission's investigation focus on whether there was any withholding of information regarding new gas supplies and whether any gas producers were violating Section 5 of the Federal Trade Commission Act. After a preliminary investigation and a series of depositions, the Commission issued a subpoena to 11 major oil companies on November 24, 1971. All 11 moved to quash the subpoena. Their motions were denied by the Commission on June 27, 1972.

Eventually, 4 of the 11 companies¹⁵¹ responded to the subpoena with internal gas reserve documents. The Federal Trade Commission sought court enforcement of the subpoena to the other 7 companies but the issue remains unresolved to date.¹⁵²

On the basis of data submitted by the 4 companies and an extensive staff investigation which included interviews with members of the American Gas Association (the trade association which compiles natural gas reserve statistics), the staff of the Bureau of Competition recommended to the Commission that a complaint be issued against the 11 companies and the American Gas Association (AGA).¹⁵³

The staff recommendation that a complaint be issued was based on its conclusion that "the AGA reserve reporting procedures are tantamount to collusive price rigging."¹⁵⁴ The staff's theory of the complaint was based upon the fact that the amount of natural gas reserves is a component in the regulated rates as set by the Federal Power Commission. The price of gas varies inversely with those reserves. The staff felt that because the gas producers and the American Gas Association are the only source of information on reserves for the Federal Power Commission and have an incentive to lower those reserve figures in order to obtain a higher price, the system was a violation of Section 5 of the Federal Trade Commission Act which prohibits "unfair methods of competition in or affecting commerce."

¹⁵⁰ Senator Hart's letter was dated September 1, 1970.

¹⁵¹ For a further discussion of the natural gas reserves controversy, see Chapter 10 of this report, *supra*, Federal Power Commission. Gulf Oil responded in November, 1972, with 12,000 documents; Union Oil Company responded in March, 1973, with 15,000 documents; Continental Oil Company responded in June, 1973, with 36,000 documents; and Pennzoil responded in November, 1973, with 15,000 documents.

¹⁵² Judge Hart of the District of Columbia District Court filed an order on March 22, 1974, adopting a modified version of the subpoena as proposed by respondents. The D. C. Court of Appeals affirmed this order in part and reversed it in part. (*FTC v. Texaco, et al.*, 517 F.2d 137, D.C. Cir. 1975). On February 8, 1976, the Court of Appeals vacated its earlier order and ordered a rehearing *en banc*, which took place on April 19, 1976.

¹⁵³ The Bureau of Competition staff's initial complaint recommendation was dated March 25, 1975. It was concurred in by the Director of the Bureau of Competition and transmitted to the Commission on May 30, 1975.

¹⁵⁴ Memorandum to Federal Trade Commission from Theodore L. Lytle, Jr., John M. Sipple, Jr., Robert B. Greenbaum, Roger B. Pool and James V. Dick, Attorneys, Bureau of Competition, FTC, March 25, 1975, at 4. The entire memorandum is reprinted in *Natural Gas Hearings*, *supra* note 149, Vol. I, at 12.

On June 9, 1975, the Subcommittee on Oversight and Investigations heard testimony from two Commission staff attorneys¹⁵⁵ concerning the Bureau of Competition's recommendation that a complaint be issued. The staff explained the importance of reserve figures thusly:

Mr. LEMOV. [Subcommittee Chief Counsel] Now, what is a reserve addition?

Mr. LYTLE. A reserve addition is, very roughly, the sum of all new discoveries within a year, the new reservoir discoveries, extensions, and positive revisions; in other words, the amount of reserve discovered in a given year.

Mr. LEMOV. "Reserve additions" is how much new gas they find in a given year?

Mr. LYTLE. That is right.

Mr. LEMOV. That is a pretty important concept, isn't it, reserve additions?

Mr. LYTLE. It is the most important factor in the Federal Power Commission cost-base pricing.

Mr. LEMOV. The most important factor in the Federal Power Commission's setting of wellhead gas prices?

Mr. LYTLE. That is right.

Mr. LEMOV. Of course, those prices are prices to the pipeline for purchase at the wellhead?

Mr. LYTLE. In interstate commerce; that is correct.

Mr. LEMOV. That price gets passed along to the ultimate consumer by the pipeline; isn't that correct?

Mr. LYTLE. That is right.

Mr. LEMOV. The Federal Power Commission price based on reserve additions has great impact on the price that the consumer pays for gas to heat his home or run his factory; isn't that right?

Mr. LYTLE. Yes; it has a substantial effect.¹⁵⁶

In response to questioning, the Commission staff attorneys indicated that the natural gas reserve figures compiled by the American Gas Association were deficient in accuracy:

Mr. LEMOV. . . . Has your investigation come to any conclusion on whether the American Gas Association figures are the best possible figures?

Mr. ANDERSON. Yes. We have concluded they are not.¹⁵⁷

The problem is that we can't categorically say and we do not say that we have evidence that the producers systematically manipulated the AGA reporting system so as to orchestrate a dummied-up shortage.

On the other hand, we were able on the basis of the return from four of the companies to show evidence which indicates that the AGA figures were badly out of whack in many instances when you compared them with other figures. of which confirmed our judgment that the system was deficient and was susceptible to manipulation.¹⁵⁸

The Commission's Bureau of Economics opposed the issuance of a complaint against the AGA and the gas producers. Two economists in the Bureau, after reviewing the complaint memorandum, prepared a statement to the Commission dated April 17, 1975.¹⁵⁹ They disputed the evidence compiled by the Bureau of Competition and concluded that "[e]xamination of the evidentiary material does not support the charges being made by the Bureau of Competition."¹⁶⁰

¹⁵⁵ Kenneth C. Anderson, Assistant Director, Bureau of Competition and Theodore Lytle, Jr., Staff Attorney, Bureau of Competition. The two attorneys testified pursuant to subpoenas issued by the Subcommittee.

¹⁵⁶ *Natural Gas Hearings*, *supra* note 149, Vol. I at 9.

¹⁵⁷ *Id.* at 219.

¹⁵⁸ *Id.* at 370.

¹⁵⁹ Memorandum to Federal Trade Commission from Joseph Mulholland and Joanne Salop, Economists, Bureau of Economics, FTC, April 17, 1975, reprinted at 618, Vol. I, *Natural Gas Hearings*.

¹⁶⁰ Memorandum, *supra* note 159, at 1, *Natural Gas Hearings*, Vol. I, at 618.

Those economists, Dr. Joseph Mulholland and Dr. Joanne Salop, testified (at the request of the Minority) before the Subcommittee on June 26, 1975. Their prepared statement concluded that:

... the AGA investigation has unearthed no information in support of allegations that the post-1967 downturn in reserves is a statistical contrivance of the AGA and its producer members. (These charges, it should be made clear, are not part of the Bureau of Competition's proposed complaint.) Rather, we feel that inferences or underreporting drawn from the Bureau of Competition's complaint memos are based on incorrect interpretations of the testimonial evidence and invalid statistical comparisons.¹⁶¹

Analysis of the April 17, 1975, Bureau of Economics memorandum indicates that the economists were attempting to challenge the legal sufficiency of the evidence supporting the complaint. The memorandum asserts that "[h]aving established the incentives of the producers and the link between the AGA reserve statistics and the wellhead price of natural gas, the Bureau of Competition must go on to *establish the fact of underreporting*."¹⁶² This assertion as to the need to show underreporting is at odds with the Bureau of Competition's statement that it was charging only that the system was deficient, unreliable, and misleading. Moreover, the assertion illustrates that the economists, lacking legal training, were submitting their judgment as to the amount of evidence necessary to issue a Commission complaint.

The memorandum contains analysis of all evidence presented in the Bureau of Competition's complaint, nonstatistical as well as statistical. The following exchange between Congressman Toby Moffett and Dr. Mulholland indicates the Subcommittee's concerns that the economists were venturing a legal opinion:

MR. MOFFETT. . . . Mr. Mulholland, there is a great deal of attention focused on the debate regarding the deregulation of natural gas. That is true, isn't it?

MR. MULHOLLAND. Yes.

MR. MOFFETT. Would it be fair to say that there is a debate within your agency on the matter, that there are differences of opinion?

MR. MULHOLLAND. Yes.

MR. MOFFETT. You are basically on the side of deregulation whereas the people in the Bureau of Competition favor continued regulation? Would that be a fair general statement?

MR. MULHOLLAND. No, I can't really say that.

MR. MOFFETT. You have testified today that you think we need more flexibility. How flexible would you like the pricing system to be?

MR. MULHOLLAND. Again, just talking for myself—

MR. MOFFETT. That is all I want to know, what your opinion is.

MR. MULHOLLAND. My feeling is that it should be a good deal more flexible than it is.

MR. MOFFETT. There are people in the FTC who think it should not be; isn't that correct?

MR. MULHOLLAND. Yes; but within the Bureau of Economics, also.

MR. MOFFETT. Fine. Believe me, I am not putting that down, I think it is healthy to have differences of opinion within an agency. I worked in a Federal agency before and I think that debate is a good thing. But, as far as your role in this very serious matter, you have argued with the Bureau of Competition's legal theory and I think the chairman has pointed that out very well.

Are there other instances when you, as an economist, have offered an opinion on the legal theory of the Bureau of Competition's plans.

MR. MULHOLLAND. No; I have not. I would like to point out that I did not really give an opinion on the legal theory in the current AGA case either.

¹⁶¹ *Natural Gas Hearings*, Vol. I, at 606.

¹⁶² Memorandum, *supra* note 159, at 3, *Natural Gas Hearings*, Vol. I at 620 (emphasis added).

Mr. MOFFETT. You certainly did. You are making a judgment, and drawing a conclusion about whether or not a complaint should be filed. If that is not an opinion on legal theory, I don't know what is.

Mr. MULHOLLAND. My position is that a number of allegations were made in support of whatever the legal theory was in the case. Our job really was to look at these allegations. In particular I was assigned to analyze the statistical presentation. My judgment was that for the most part the statistical presentations did not support the allegations made by the Bureau of Competition.

Mr. MOFFETT. If I may call your attention to the April 16, 1975, memorandum from Scherer, Folsom & Glassman to the Commission, page 4:

"Public Policy Considerations. We feel that an FTC complaint against AGA and others at this point would be a perverse action when public policy considerations are taken into account. As is well known, there exists presently a spirited debate as to whether or not natural gas regulation should be continued or terminated. If the FTC should issue a complaint at this point it would surely cloud public policy debate on regulation which is presently taking place."

In the next 10 lines the point is explained:

"Supporters of continued regulation would be able to point to the complaint as proof that the natural gas shortage was a contrivance of the producers. In an environment where major gas producers are under serious suspicion of engaging in conspiratorial behavior the chances for a continuing rational debate on the issue of deregulation would be much diminished. The result might be continued FPC regulation into the distant future."

In other words, your Bureau is concerned that the public debate may be clouded. You demonstrate that your concern is only that the push for deregulation might somehow be slowed. That to me indicates that the Bureau is leaning toward deregulation. That is the first thing I am trying to establish, No. 1.

Second, you injected yourself into a debate over legal theory. I don't have any problem with a difference of opinion within an agency so long as you are speaking about your area of expertise. But here you are clearly injecting yourselves into a debate on legal theory. You are obviously concerned that this complaint might be frivolous, isn't that correct?

Mr. MULHOLLAND. Yes.¹⁶³

The result of the Bureau of Economics' position was that the Bureau of Competition was in effect forced to prove its legal case twice; once at the staff stage and once at trial, if held. This is contrary to the statutory scheme of the Act. Granted the usefulness of having the Bureau of Economics comment upon the economic aspects of a proposed complaint, the Bureau officials here commented on the legal sufficiency of the complaint, apparently based, in part on their personal desire for an end to Federal price control over natural gas. Such comments lie outside of the economists' expertise or authority and serve only to delay Commission actions to enforce the law.

The Federal Trade Commission was thus faced with a major decision during the summer of 1975: whether or not to issue a complaint against the American Gas Association and the 11 major gas producers. The considerations were:

(1) A direct conflict between two Bureaus as to whether a complaint should be issued;

(2) The fact that the Commission's investigation had been perceived as inextricably tied to the developing public and Congressional debate over Federal regulation of the price of natural gas.

With various recommendations in hand, the Commissioners in June began to deliberate. Ordinarily, the recommendation of a complaint to the Commissioners is not public. The prospective respondents were aware that the Commissioners were considering issuance of a complaint because, in view of the bearing of the investigation on the Con-

¹⁶³ *Natural Gas Hearings*, Vol. I at 748-49.

gressional debate on natural gas price regulation, this Subcommittee had made public the testimony of the FTC Bureaus.

On July 3, 1975, Chairman Lewis Engman met with two of the American Gas Association attorneys, Edward Warren and Frederick Rowe, at their request.¹⁶⁴ Others present were Robert Liedquist, Acting Director of the Bureau of Competition and representatives from the Bureau of Economics, the General Counsel's Office, and the Chairman's staff. Neither Kenneth Anderson, the Assistant Director, nor Terry Lytle, the staff attorney most familiar with the AGA case, was there.

At this meeting, the attorneys for the AGA argued that a complaint should not be issued. A memorandum describing this meeting says:

Mr. Rowe said that the issuance of a complaint against AGA would result in years of costly and wasteful litigation with no assurance that the staff's objective would be reached. Mr. Rowe raised the possibility of non-formal, non-litigation action which might achieve many of the objectives of the staff. A formal complaint proceeding, Mr. Rowe argued, would publicly pit the Bureau of Competition against the Bureau of Economics which would not be in the best interest of the public or the Federal Trade Commission. Mr. Rowe said the Federal Trade Commission should not go into such a proceeding without exploring other possibilities for achieving its objectives.¹⁶⁵

The Commission later indicated that such a meeting prior to the issuance of a complaint is not unusual. The Commissioners testified as follows:

Mr. ROSENBERG. [Subcommittee Counsel]. Is this kind of meeting normally held prior to decisions on proposed complaints?

Mr. COLLIER. Is it an ordinary procedure?

Mr. ROSENBERG. Yes.

Mr. COLLIER. I don't know. It could be the Commission probably take their own counsel on those matters and may approach requests in different ways. I have not had the occasion personally to confront the situation, but perhaps each of the members of the Commission could elaborate on the question whether this is an ordinary process or an extraordinary one.

Mr. DIXON. It has been my policy, since 1961 when I returned to the Commission as a Commissioner, to have an open door policy. I find the best thing a Commissioner can carry to the table for a decision is as much information as he can get.

If a Commissioner gets all of his information filtered through the staff, it could be good information, but it could be so-called bias by people. So, I have always welcomed anyone coming into my office on any matter up until the time a matter enters adjudication. After that, any communications must be made on the record.

The practice Mr. Rosenberg has described is not unusual. It has been my experience that most Commissioners are receptive to listening to the public, including members of the public who are being investigated by the Commission.

Mr. ROSENBERG. Mr. Dixon, has this been the case where a proposed complaint is pending before the Commission at that particular point?

Mr. DIXON. Yes, when staff has recommended a complaint but the Commission has not yet voted on it. I sometimes find proposed respondents more knowledgeable about such matters than I am individually. How they find things out, I don't know, but I find they sometimes follow well what is going on inside the Commission.

Mr. OTTINGER. Aren't all communications concerning a pending case put on the record?

¹⁶⁴ A full discussion of this meeting is contained in a memorandum to the file from Margery Smith, Assistant to Chairman Engman, July 9, 1975, reprinted at *Hearings, supra* note 45, at 573-75.

¹⁶⁵ Memorandum, *supra* note 164, at 2; *Hearings, supra* note 45, at 574.

Mr. DIXON. No, sir, not until we vote a formal complaint. If it was, we might as well sit out on Pennsylvania Avenue and talk to opposing counsel because the only one that would be benefited would be opposing counsel.

* * * * *

Mr. OTTINGER. I would like to express my opinion. That subjects you to a great deal of legitimate criticism, it seems to me, and that seems to be causing real problems.¹⁶⁰

On July 29, 1975, several weeks after the meeting with the AGA attorneys, the Commission by a 4-0 vote declined to issue the complaint. The matter was returned to the staff for further investigation. For this purpose, the Commission ordered that efforts to obtain court enforcement of the outstanding subpoenas be continued.¹⁶⁷ The situation as of April, 1976, was summarized by Harry Garfield, Assistant Director of the Bureau of Competition, in his testimony before the Subcommittee:

The case at present, as far as I and my staff are concerned, is in a dormant stage. The Commission has declined to issue the complaint that was recommended last summer. The court proceeding for enforcement of the subpoenas has resulted in a determination by the D.C. Circuit Court upholding the District Court in effect denying our right to obtain the basic reserve data that we want, at least to obtain it in order to be able to establish that there was in fact under-reporting.

A decision was rendered last August. My understanding is the general counsel filed a motion for reargument before the D.C. Circuit Court. That motion was granted about a month ago and the reargument will take place next Monday.

At the present time there is nothing that my staff can do. We are not in a position to obtain hard reserve data from the companies. I have a single staff attorney on the case at this present time. I had two for a short while last summer. One of them was hired away by a Congressional committee.

When we obtain the right, assuming that we get a favorable decision, and the court procedures have run their course, we will staff that case as it should be staffed and we will go and obtain that information and see if we can satisfy the Commission's concerns that were reflected in its decision last summer in declining to issue the complaints.

Mr. OTTINGER. If the decision is adverse, will you be making a recommendation to Congress for a change in the law to adequately—is that the subject matter of the court, whether the statute as it presently exists permits you to obtain this information?

Mr. GARFIELD. The court decision—the general counsel really should at least correct me if I am wrong on this—the court decision is a rather complex one. What the court said was that we could obtain certain data as to actual reserves from the companies, but that we could not use that information to establish that there was, in fact, underreporting because we were estopped to do so by a prior determination of the Federal Power Commission which accepted the data that had normally been furnished by the AGA to the Federal Power Commission as being adequate for the FPC purposes.

That is a technical discussion of the law of estoppel. If that remains the law, I will certainly be recommending that we at least consider the problems that that raises for a law enforcement agency where a determination by another agency may, in effect, stop us from pursuing our obligations to enforce the anti-trust law."¹⁶⁸

Conclusion

The Federal Trade Commission has been substantially delayed in its investigation by the refusal of seven major petroleum companies to comply with its subpoena. Because the Commissioners apparently were reluctant to decide whether or not a complaint should be issued on the

¹⁶⁰ *Hearings, supra* note 45, at 575-76.

¹⁶⁷ *See* note 152 *supra*.

¹⁶⁸ *Hearings, supra* note 45, at 621-22.

basis of partial information, the gas producers have succeeded in delaying adjudication of important issues for several years.

The Commission's inability to conclude this investigation expeditiously is a consequence of its lack of statutory authority to compel persons and corporations to supply necessary data.¹⁶⁹ As the penalties for noncompliance are relatively small and the subject of the investigation has the resources and ability to delay, respondents have practical reasons to resist investigation for as long as possible on the assumption that they may gain an advantage from changing circumstances.

Intervention by the Bureau of Economics on a legal issue outside its field of competence, in effect, obliged the Bureau of Competition to litigate its case before the Commission while issuance of the complaint was still under consideration.

The FTC meeting with attorneys for the American Gas Association on July 3, 1975, while the Commission debated the pending complaint, created an appearance of, and the potential for, improper influence. The Commission's rules on such *ex parte* communications do not apply before a complaint is issued.

Recommendations

(1) The Congress should enact S. 642 which would substantially increase the penalties for noncompliance with Commission orders compelling respondents to furnish needed information.

(2) The Commission should direct the Bureau of Economics to refrain from comment on matters outside of its area.

(3) The Commission should prohibit *ex parte* communications with Commissioners while a recommended complaint from a Bureau is pending before them.

G. CLEARANCE TO PRACTICE BEFORE THE FEDERAL TRADE COMMISSION

Many regulatory agencies are concerned about the participation by former Commissioners or other former employees in proceedings before the agency. A former Commissioner or employee may have acquired enough knowledge of a case through experience in the agency to hold an unfair advantage over other participants. Knowledge of an internal memorandum which discussed the trial tactics of the agency's attorneys would give such an advantage. Even when there may be no actual unfairness, the participation of a former employee could create the impression of an unfair advantage.

The Federal Trade Commission's addresses these concerns in its Rules of Practice.¹⁷⁰ The regulation generally prohibits participation

¹⁶⁹ For a further discussion of the Commission's data gathering difficulties, see Section III(D) of this chapter, *supra*.

¹⁷⁰ Section 4.1(b), Federal Trade Commission Rules of Practice (16 CFR 4.1(b)):

(b) Restrictions as to former members and employees. (1) Except as specifically authorized by the Commission, no former member or employee of the Commission shall appear as attorney or counsel or otherwise participate through any form of professional consultation or assistance in any proceeding or investigation, formal or informal, which was pending in any manner in the Commission while such former member or employee served with the Commission.

(2) In cases to which subparagraph (1) of this paragraph is applicable, a former member or employee of the Commission may request authorization to appear to participate in a proceeding or investigation by filing with the Secretary of the Commission a written application therefor, disclosing the following relevant information: (i) the nature and extent of the former member's or employee's participation in, knowledge of,

in a case which was pending during the person's employment, but permits the former Commissioner or staff member to petition for a "clearance to practice". The petition must describe the former employee's access to non-public documents.¹⁷¹ The Commission may give "clearance" unless it determines that any one of three situations exists:

(1) the petitioner "participated personally and substantially in the proceeding or investigation" while at the Commission;

(2) the petitioner who filed during the first year after leaving was "officially responsible" for the case during the last year at the Commission; or

(3) an actual or apparent impropriety will occur.¹⁷²

The third condition above has proven the most troublesome. It is difficult, if not impossible, to create a definition of "apparent impropriety" which will cover differing factual situations and afford sufficient guidance. The Commission is faced with the question of "apparent to whom?"—a member of the bar? a current Commission employee? the Congress or a member of the public? Opinions differ on what appears improper. It is difficult for anyone to know whether clearance will be granted, and equally difficult for Congress and the public to assess the Commission's policy on former employees.

If the Commission interprets the "apparent impropriety" section narrowly to resolve questions in favor of clearance, its procedures may be unfair. If it interprets "apparent impropriety" broadly, to restrict petitioners, it may discourage recruiting of talented staff members who fear that they may not be able to appear before the Commission if eventually they enter private practice.

An example of the considerations in applying the "apparent impropriety" standard was the petition for clearance submitted by Basil J. Mezines. Mezines was employed at the Commission for 24 years. From November 1970 until his termination in June 1973, he was Executive Director. The Executive Director

... is the chief operating official. He exercises executive and administrative supervision over all the offices, bureaus, and staff of the Commission, and, in coordination with the Office of Policy Planning and Evaluation, resolves problems concerning priorities in case handling.¹⁷³

Mr. Mezines entered private law practice in Washington, D.C. and on August 13, 1974, he applied to the Commission for permission to appear as an attorney in three actions—Lustine Chevrolet, Inc.,

and connection with the proceeding or investigation during his service with the Commission; (ii) whether the files of the proceeding or investigation came to his attention; (iii) whether he was employed in the same bureau, division, or administrative unit in which the proceeding or investigation is or has been pending; (iv) whether he worked directly or in close association with Commission personnel assigned to the proceeding or investigation; (v) whether during his service with the Commission he was engaged in any matter concerning the individual, company, or industry involved in the proceeding or investigation.

(3) The requested authorization will not be given in any case (i) where it appears that the former member or employee during his service with the Commission participated personally and substantially in the proceeding or investigation, or (ii) where the application is filed within one (1) year after termination of the former member's or employee's service with the Commission and it appears that within a period of one (1) year prior to the termination of his service the former member or employee was officially responsible for the proceeding or investigation. In other cases, authorization will be given where the Commission is satisfied that the appearance or participation will not involve any actual or apparent impropriety.

(4) In any case in which a former member or employee of the Commission is prohibited under this section from appearing or participating in a Commission proceeding or investigation, his services shall not be utilized in any respect in such matter nor shall the matter be discussed with him in any manner by any partner or legal or business associate.

¹⁷¹ *Id.* at 2.

¹⁷² *Id.* at 3.

¹⁷³ Organization Manual, Section 10, Federal Trade Commission.

Rosenthal Chevrolet Company, and Peacock Buick, Inc.—known as the “D.C. Automobile Cases.”

It was acknowledged that Mezines probably saw three intra-agency memoranda discussing these particular cases and that he probably attended the meeting of the Commission at which it voted to issue the complaints. At such meetings, the Commission holds candid discussion of issues and theories as they decide whether the facts presented are sufficient to give them “. . . reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce. . . .”¹⁷⁴

The Commission decided to grant clearance to Mezines by a vote of three to two (Chairman Engman and Commissioner Hanford dissenting). Their opinions illustrate different concerns. The opinion of the Commission, written by Commissioner Nye, concludes that:

If we believe apparent impropriety is involved in any situation in which the public interest could be in any way threatened, even by the most attenuated hypotheses, we would simply be saying that former employees of the Commission may never practice before the Commission. Although presumably Congress could enact such a law and we could so provide by rule, there is little question that the result would be to foreclose large numbers of attorneys from a practice they well understand and at which they are most competent. We believe this is too high a price for attorneys to pay in consequence of their choice to devote a part of their career to public service. Such a result, we are convinced, would be highly detrimental to the public interest.¹⁷⁵

Chairman Engman, in his dissenting opinion, expressed a contrary view as to what action would be necessary to protect the public interest. He stated that, “The Commission has a duty to the public not only to *assure* it of absolute scrupulousness, but to *convince* it of that fact.”¹⁷⁶

The majority gave great weight to the effect a strict standard would have upon the recruitment and retention of qualified attorneys, as well as its burden on those attorneys after their departure from the Commission. Though Chairman Engman recognized this concern, he did not concur in its overriding importance. His opinion states:

I am aware that a strict standard of conduct could create some hardship for those who leave the Commission's employ and wish to practice before it. This hardship may fall unevenly in that some employees are exposed to far more cases than others. In fact, those such as the applicant, who are charged with greater responsibilities while in the government, will no doubt bear the greater burden when they depart for private practice—at least for a limited period of time. It is arguable therefore that a strict standard could impede the Commission's efforts to recruit highly qualified persons, especially for management positions. I have always placed great importance on the continued recruitment of able attorneys, and I would hope that a standard such as the one I propose would deter no one. But I place even greater importance on the preservation of public trust in our proceedings. Moreover, I believe that professionals who wish to serve in the government will recognize that such burdens are part of the price one is expected to pay for the privilege of public service.¹⁷⁷

The clearance issue was the subject of questions at the Subcommittee's oversight hearing on the Federal Trade Commission on March 29, 1976. Responding to a question posed by Congressman Jim Santini, Commission Chairman Collier noted that:

¹⁷⁴ 15 U.S.C. 45.

¹⁷⁵ In the Matter of the Application of Basil J. Mezines, Opinion of the Commission (April 10, 1975), at 5-6 [Subcommittee files].

¹⁷⁶ *Id.*, Dissenting Opinion of Chairman Lewis A. Engman, (April 10, 1975), at 4.

¹⁷⁷ *Id.* at 4-5.

My general comment is that invariably, no matter how hard one tries to take care of this and describe this in the rules of practice, often these matters have to come down to the specific facts in a particular matter. This is because the overall guidance which each Commissioner has to operate under is a standard that is no more specific than "the appearance of impropriety."

Pursuant to that standard, the Commission has tried to indicate the factual information that it feels would be useful to know and which the applicant must provide in order for the Commission to make a judgment on a standard which ultimately is that generalized.

So in connection with your general question, it is always possible that a general rules change could provide better guidance but, as in so many other areas, it is the application of a specific fact to some general standard that is going to produce over time a better understanding of what the Commission is doing, and a better opportunity for the Commission to be accountable to the Congress and to the public.

It is one of the most complex areas I have seen involving kaleidoscopic factual patterns.¹⁷⁸

The Subcommittee believes that the vagueness of the "apparent impropriety" language neither gives sufficient guidance to present and former Commission employees nor does it really assure the public that improper situations will not occur that will seem improper to some. It would therefore seem preferable for the Commission to substitute for the "apparent impropriety" language a set period of time during which former high-level Commission employees would be prohibited from practicing before the Commission at all. The Subcommittee believes that the Commission should amend its Rules to provide that any former Commissioner or staff member at the GS-15 level or above be prohibited from appearing before the Commission or advising a client in a pending matter for 2 years.¹⁷⁹ Such a provision could remove much of the concern about unfairness, provide a definite guideline for present and former employees, and bolster public trust in the Commission. In addition, the Congress and the Commission should adopt our recommendations on minimizing conflicts of interest found in Chapter 17.

H. PUBLIC FUNDING AND CONSUMER PARTICIPATION

Federal regulatory agencies have been criticized for not having a sufficient amount of "public" or "consumer" participation in their decisionmaking processes.¹⁸⁰ One explanation is that public or consumer groups ordinarily do not have the resources to plead their cause although some have expressed doubts as to the value of such participation. The experience of the Federal Trade Commission in funding consumer groups has demonstrated both the effectiveness of such a procedure and the value of their contributions.

The Federal Trade Commission has specific statutory authorization and an appropriation to pay expenses of persons or groups who would otherwise be unrepresented in rulemaking proceedings. No other regulatory agencies have this authority so specified.¹⁸¹ Section 202(a) of

¹⁷⁸ *Hearings, supra* note 45, at 584-85.

¹⁷⁹ This would supplement, not replace, the prohibitions regarding "substantial participation" and "official responsibility."

¹⁸⁰ For further discussion of public participation in regulatory agencies, see Chapter 13 of this Report.

¹⁸¹ Letter from Honorable Elmer B. Staats, Comptroller General of the United States to Honorable John E. Moss, Chairman, Subcomm. on Oversight and Investigations, House Comm. on Interstate and Foreign Commerce, May 10, 1976, reproduced as Appendix D(2) to this report.

the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, amending Section 18 of the Federal Trade Commission Act, reads in part:

(h) (1) The Commission may, pursuant to rules prescribed by it provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

(2) The aggregate amount of compensation paid under this subsection in any fiscal year to all persons who, in rulemaking proceedings in which they receive compensation are persons who either (A) would be regulated by the proposed rule, or (B) represent persons who would be so regulated, may not exceed 25 percent of the aggregate amount paid as compensation under this subsection to all persons in such fiscal year.

(3) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed \$1,000,000.¹⁸²

Under the authority of that section, a sum of \$500,000 was appropriated for the 1976 Fiscal Year. After the enactment of the Magnuson-Moss Act on January 4, 1975, the Commission developed procedures and standards for processing applications and deciding what persons or groups would qualify.

In connection with FTC rulemaking proceeding on the hearing aid industry, the National Council of Senior Citizens, Inc. (NCSC) on January 30, 1976, applied for funding for the purpose of representing consumers. The initial notice of a proposed trade regulation rule for the hearing aid industry had been issued on June 24, 1975,¹⁸³ and the final notice had been published on December 30, 1975.¹⁸⁴ In its application, the NCSC described itself as

a non-profit, non-partisan organization with a membership of over 3,500,000 older persons and over 3,500 senior citizen clubs throughout the nation . . . a large, national organization with strong local roots.¹⁸⁵

In its application, the NCSC alleged that effective consumer participation in this rulemaking proceeding should include testimony from expert witnesses as well as a systematic gathering of information on consumer experience with the hearing aid industry. The Council proposed to present the testimony of an attorney, a gerontologist (doctor specializing in problems of older people), an economist, an audiologist (specialist in hearings problems as certified by the American Speech and Hearing Association), an otolaryngologist (ear, nose and throat medical specialist) and "an experienced state hearing aid reform advocate."¹⁸⁶ The NCSC proposed to develop information on the consumer experience through a systematic collection of affidavits in two urban areas (Miami and Boston), the presentation of 10 consumer witnesses to relate their experiences, and the collection of information from nursing homes regarding the selling of hearing aids in that set-

¹⁸² Federal Trade Commission Act Section 18(h), 15 U.S.C. 57a.

¹⁸³ 40 FR 26646.

¹⁸⁴ 40 FR 59746.

¹⁸⁵ Letter to Martin Shepard, Presiding Officer, Hearing Aid Rule, Federal Trade Commission, from William R. Hutton, Executive Director, National Council of Senior Citizens, January 30, 1976 [Subcommittee files].

¹⁸⁶ *Id.* at 10.

ting. The NCSC requested \$43,026 to cover the expenses of its participation.¹⁸⁷

The proposed trade regulation rule for the hearing aid industry would mandate a variety of responsibilities. There are five major sections in the proposed rule:

- (1) Buyer's right to cancel;
- (2) Selling techniques;
- (3) Prohibited representations concerning hearing aid sellers;
- (4) Prohibited representations concerning hearing aids; and
- (5) Advertising representations which must be qualified.

The proposed rule would create a 30-day cancellation right with a full refund, less a 30-day "rental charge" plus certain other charges. It would mandate that written notice of this cancellation right be given to each purchaser.

The section on selling techniques would prohibit sales at home unless prior written permission had been given. It would require clear notice to a buyer that an aid is used or has been reconditioned. Techniques whereby dealers give "free hearing tests" with the purpose of selling hearing aids would be prohibited unless the dealer disclosed the real purpose of the "free tests."

Hearing aid dealers would be prohibited from indicating that they are other than sellers (*e.g.*, any implication their "hearing aid center" is a governmental or public service organization). Various dealer representations concerning the possible benefits or characteristics of an aid or the need for a hearing aid would be prohibited. In addition, certain advertising representations would be required to be qualified.

Public hearings were held in Washington, D.C., for three weeks during April and May, 1976. Further hearings were held for one week in June, 1976, in Chicago and for three weeks in August, 1976, in San Francisco. The function of the National Council of Senior Citizens at these hearings was two-fold: to cross-examine industry witnesses and to present its own direct testimony as well as that of the consumer witnesses.

The Council brought a special expertise to the rulemaking proceeding which probably could not have been supplied by the Federal Trade Commission staff. This was the Council's extensive experience with the hearing aid industry and its contacts with a number of hearing aid users. Moreover, the Council could act, and did act, as an effective advocate for consumer interests by vigorously cross-examining industry witnesses.

A review of the transcript of the hearings indicates that the attorney for the Council, Mr. David Marlin, was a vigorous proponent of the consumer interest. On the second day of his participation, a procedural issue arose concerning an attempt by the industry attorneys to introduce a "rebuttal" witness with no notice.

Mr. Marlin argued to the Presiding Officer that such a step could unfairly delay the hearings:

The precedent I am concerned about is that every time such a witness, whether that witness be consumer or dealer or audiologist, testifies, that there will be

¹⁸⁷ The original application requested \$34,926 for participation in the Washington, D.C., hearings. In a supplemental application dated March 15, 1976, an additional \$8,100 was requested to participate in the Chicago and San Francisco hearings. The two applications were approved on March 1 and April 23, 1976, respectively.

a call for a rebuttal witness. I think that such a precedent could so delay or protract these proceedings that we would never accomplish anything to an end point. I know everybody wants to get to an end point.

* * * * *

The full focus of the hearing is no surprise but rather let us get the information out in advance, give all parties an opportunity to review that information and let us focus cross-examination and rebuttal of these hearings under a very limited issue.

We have not had an opportunity to do that. The industry counsel would have you further deviate from the expected course of Magnuson-Moss by ruling in their favor and we strongly object to your doing so.¹⁸⁸

An important issue in the hearing aid rule is the competence of hearing aid dealers to test hearing and to fit a hearing aid correctly. Mr. Marlin pursued the following line of questioning with Mr. Richard Scott, who is Vice President of Siemens Hearing Instruments Company and an officer of the Hearing Aid Industry Conference:

Mr. MARLIN. Did I understand you to say that you believe that a hearing aid dealer can in two days' training become an accomplished tester and dispenser of hearing aids?

Mr. SCOTT. I said tester. We can train someone. We are talking at that point about testing hearing. I said in two days we can teach someone to test hearing and test it well.

* * * * *

Mr. MARLIN. Let's see whether or not we can pinpoint your answer. Are you saying that you don't know?

Mr. SCOTT. I am saying that I cannot say for every individual how long it is going to take.

Mr. MARLIN. Can you say for the average?

Mr. SCOTT. Let up put it this way. In a couple of months—I have to give you a ballpark figure—I could make you, working side by side, familiar enough with enough problems that came in, the terms of fitting changes, adjustments and the like, to become proficient.¹⁸⁹

A second important issue involved the proposed 30-day cancellation right and whether parts of the industry currently offer such a right without adverse economic effect:

Mr. MARLIN. Under your policy of the trial period, cannot the purchaser within 45 days after purchase return the aid and get his money refunded?

Mr. SCOTT. Yes.

Mr. MARLIN. He in effect by your policy has a right to return, does he not?

Mr. SCOTT. Yes.

Mr. MARLIN. Putting it another way, a right to cancel?

Mr. SCOTT. Right.

Mr. MARLIN. Thank you.

Mr. SCOTT. But it is not put that way, and it is a right to return or it is a trial privilege, not a right to cancel. Language is extremely important when you are dealing with people, as you know.¹⁹⁰

The exchanges above are examples of what occurred many times in the hearings: an informed, active consumer presence which clarified and sometimes challenged the views of industry witnesses. It is true that the Commission staff could and perhaps would have conducted a similar cross-examination. However, the staff's resources are limited, staff members cannot prepare themselves on every issue. Moreover, the staff is obliged to be relatively neutral in a rulemaking proceeding. The presence of the National Council of Senior Citizens as an inde-

¹⁸⁸ Proceedings Before the Federal Trade Commission on the Hearing Aid Industry, April 12–August 18, 1976, at Tr. 2240, 2251 (April 27, 1976) [hereinafter cited as *FTC Hearing Aid Hearings*].

¹⁸⁹ *FTC Hearing Aid Hearings*, at Tr. 2346–49 (April 27, 1976).

¹⁹⁰ *Id.* at Tr. 2375 (April 27, 1976).

pendent advocate added dimension which could not have been supplied by the Commission staff.

In addition to serving as an effective advocate, the National Council of Senior Citizens presented an affirmative case of consumer experiences by:

- (1) Its own direct testimony;
- (2) The introduction of 80 affidavits from consumers which told of their experiences; and
- (3) The direct testimony of 10 consumers from the Boston and Miami areas.

The direct presentation of consumer experiences through affidavits and testimony added an important source of information for the Commission. The Commission staff conceivably could have developed such testimony, but in the context of the staff's other responsibilities such direct testimony might not have been presented. The presence of the Council *ensured* that such information would be presented.

The direct consumer contribution was probably more effective because it was gathered by a group familiar with the needs and experiences of this class of consumers, sharing intimately experiences which might not be perceived by the Commission staff. An advocate for consumer interests also can be expected to search diligently for those consumers whose experiences most strongly call for corrective action. A few examples illustrate how the NCSC effectively presented consumer experiences:

MR. JACK WORTZEL

Mr. WORTZEL. My name is Jack Wortzel. I am a resident of 826 85th Street, Miami Beach, Florida. I have been a resident of south Florida since 1971. I am 69 years old.

I have experienced hearing difficulties for the last five years. My problem consists of not being able to distinguish voices in a crowd. I can hear fairly well the voice of a single person alone in a room. However, when there is a group conversation, I have great difficulty understanding what is being said.

In the summer of 1973 a friend of mine told me about a hearing-aid dealer in Miami who was supposed to have some connections with the senior citizens' groups. He advertised regularly in the senior citizens' newspapers. The dealer was Mr. Gornell of Southern Hearing Aid Service, Northside Shopping Center, 159 North Court, Miami, Florida 33147.

I went in to see Mr. Gornell and he tested my hearing with a machine that had some earphones connected to it. I do not know if Mr. Gornell is qualified to give hearing tests but he gave me the impression that he was very capable. He said that I had significant loss of hearing in my left ear but that he had a hearing aid that would solve all my problems. Of course, he pressured me into buying the hearing aid that same day.

After he had taken the time to give me the test and gone through all the trouble, I felt obliged to buy the hearing aid right away. He said: "Look, you have come all the way out here to see if I could help you with your hearing. I take special interest in you, give you a test and look to see if there is a hearing aid in my stock that would be right for you. After doing all this, I find just the hearing aid that you need."

The hearing aid was Electone's model 750. I decided to go ahead with the purchase and paid Mr. Gornell \$230 on June 9, 1973.

The Electone Number 750 hearing aid sold to me by Mr. Gornell was a disaster. I could not understand one thing when people spoke to me. In addition I would get a lot of static. I went back to Mr. Gornell several times for adjustment. While he did not charge me for the adjustments, I was not obtaining any benefits from them.

I must have gone over a dozen times to Mr. Gornell's office during the weeks following my purchase of his aid. Southern Hearing Aids is located far away from my home and every trip there represented a great inconvenience for me. This aid was not for me.

On July 21, 1973, Mr. Gornell suggested that I buy a new hearing aid. He would not give me a refund on my Electone aid but would give me an allowance on the purchase of a new hearing aid. I had no choice but to go along with the deal.

That same day, he sold me Electone's model E-50, which goes into the ear. I paid him an additional \$49. In other words, I had already given Mr. Gornell a total of \$279. He assured me the new hearing aid would absolutely work for me. This did not happen either.

May I add something. At this time he told me he would provide a hearing aid in the ear; I would be able to hear better because it goes right through the ear instead of around the ear.

I went to Mr. Gornell's office several times for adjustments. I still could not hear with my new hearing aid. Finally he suggested that I return model E-50 but he did not want to give me a refund. He said he would send my original hearing aid, model 750, back to the manufacturer so they could convert it into a high-powered aid.

A few weeks later Mr. Gornell returned to me the new, high-powered model 750. It was just as useless as before. I heard just strange sounds with the hearing aid; I could not understand voices. I asked Mr. Gornell once again for a refund. He refused. He would not even return the additional \$49 I had given him for the E-50 model, which I eventually returned to him.

On February 20, 1974, I went to Dr. Freeman, M.D., for a checkup. He examined my ears and said the hearing aids I had been wearing were not right for me. He suggested that I go to the Jackson Memorial Hospital Audiology Clinic, 1811 Northwest 12th Avenue, Miami, Florida.

* * * * *

On February 27, 1974, I had a thorough hearing examination at Jackson Memorial's Audiology Clinic. Miss Gladys Veguilla, M.A., tested my hearing inside a sound-proof cubicle for more than one hour. She concluded that the hearing aids made for me by Mr. Gornell were not right for me. She told me I needed to wear the hearing aid in the right ear. Mr. Gornell had fitted me twice with hearing aids for the left ear. Miss Veguilla called Mr. Gornell and asked him to fit me with a new mold for my right ear.

Mr. Gornell claimed that he had made five custom molds for me at my request. I had never heard about these five molds before. The reason he told Miss Veguilla about the five molds—at a cost of \$15 each—was to justify the fact that he had not returned the additional \$49. I had paid him for the E-50 model. That is why he claimed that he made all these molds.

The truth is that he never made one extra mold for me. Where are the bills for those five molds? Let Mr. Gornell show me the bills for those five molds. Mr. Gornell refused to give me a refund.

Miss Veguilla also recommended that I wear the Qualitone BI-CROS aid model, which fits right inside the glasses. She told me that, instead of being fitted with the Electone's 750 and E-50 models, I should have been given the BI-CROS model from the start.

I went to North Miami Hearing Aids, 12440 Northeast Seventh Avenue, North Miami, Florida, and for \$20 they made a right-ear mold for the hearing aid Number 750 which I had bought from Mr. Gornell. Wearing the hearing aid on my right ear improved the situation substantially. However, I still do not hear very well. I still get too much static.

While at North Miami Hearing Aids, I tried on the BI-CROS model recommended by Miss Veguilla. Right away I could hear well again. I could hear like when I was 20 years old. It was beautiful. Unfortunately I do not have the \$400 required to buy this aid. I had to borrow money to buy the hearing aids I purchased from Mr. Gornell.

I asked Mr. Gornell for a refund once again in April of 1974. He answered me with a letter that ended with the words "We do not give refunds." I am enclosing copies of the letters I received from Mr. Gornell to show the kind of harassment I had to go through in purchasing my hearing aid.¹⁹¹

¹⁹¹ Testimony of Mr. Jack Wortzel in *FTC Hearing Aid Hearings*, at Tr. 4857-63 (May 13, 1976).

MRS. NETTIE MURRAY

Mrs. MURRAY. My name is Nettie Murray. I am a 75 year old woman, and I live at 1709 S.W. 9th Street, Miami, Florida. I have been a resident of Miami for the past 40 years.

Late in 1973, I began to experience serious hearing difficulty and decided to get a thorough hearing examination. I went to the office of Drs. Meadows and Camp, 427 Biltmore Way, Coral Gables, Florida. Dr. Camp took the case and put me through a variety of tests. He concluded that I did not need a hearing aid.

In fact, he advised me to put off the hearing aid until I absolutely could not hear without it. He specifically warned me against yielding to family pressure to wear a hearing aid. Dr. Camp said to me, "Make sure this does not happen to you; don't get a hearing aid until you absolutely feel you need one to get along."

* * * * *

Mrs. MURRAY. I kept having problems with my hearing, and about a year later—late in 1974—decided to visit the office of Drs. Meadows and Camp again. This time Dr. Meadows took the case and again I was given a complete hearing examination. The results were the same as those of the previous year. Dr. Meadows told me, "Do not get a hearing aid." Nevertheless, I was very disturbed about my inability to follow group conversations.

* * * * *

Mrs. MURRAY. Early in 1975, a man by the name of R. Restivo of "Your Hearing Aid Center," 1629 Washington Avenue, Miami Beach, Florida 33139, knocked on my home door and said he had learned that I was hard of hearing and requested permission to give me a hearing test. I do not know how he learned of my hearing condition, nor who gave him my name and address.

* * * * *

On June 16, 1975, Mr. Restivo came to my home again. This time he brought along a portable testing machine. With my approval he proceeded to give me what he described as a "thorough examination."

Unlike Drs. Meadows and Camp, Mr. Restivo tested me without the use of a soundproof cubicle. Besides the mechanical examination, Mr. Restivo gave me a distance perception test in which he would go into different rooms of my house and yell, "Can you hear me?" while I sat in the living room.

He was a very nice man and gave me the impression of being extremely competent. He told me I needed a hearing aid. I said I wanted to go back and check with Dr. Meadows before purchasing a hearing aid.

Mr. Restivo told me I should not do this: "It will only be a waste of your time and money," he said. "If you go back to Dr. Meadows all he is going to do is charge you for another visit and you will come back to me and get my hearing aid anyhow," said Mr. Restivo. By this time this nice gentleman had won us over. We had full faith and confidence in Mr. Restivo and decided to follow his advice.

* * * * *

Mr. Restivo took an impression on June 18, 1975, and I paid him \$189 as down payment for the hearing aid. The model was Electone. On June 28 I gave him an additional \$200 to complete the payment. He promised just about guaranteed results. In fact, Mr. Restivo said: "If you are not completely satisfied with the results you obtain from this hearing aid, you can call me at any time during the next year and I will trade it for any other kind of hearing aid made."

He also promised home service for any problems that might develop. This was an important consideration in our decision to go ahead with the purchase.

I wore the hearing aid until February 12, 1976, without getting satisfactory results. I telephoned him several times during the six-month period of June 1975 to January 1976 but could not reach him. Finally my husband, William S. Murray, got ahold of him on the phone on February 12 and explained the problem. I could not discriminate between sounds. All sounds ran together and, as a result, all that I was getting from the hearing aid was amplified noise.

We asked him to come to our home to examine the hearing aid, as he had promised to do. He denied ever making such a promise; we would have to take

the hearing aid to his office if we wanted him to examine it. His new office was located in the Cutler Ridge Arcade, 20237-D South Dixie Highway, Miami, Florida.

At that time we realized that all that we had from him in writing was the receipt of the purchase price. None of the promises made to us at the time of the purchase were in written form.

When we arrived at his Cutler Ridge office, Mr. Restivo was selling a hearing aid identical to the one I had purchased to a man from New York. We were shocked when Mr. Restivo told his customer the total price for the aid was \$197.50.

After the customer purchased the hearing aid and left the store, we asked Mr. Restivo why he had charged us \$389 for the same hearing aid. He answered that the hearing aids had gone on discount price in July, the month after we had bought ours. Of course, had we known this at the time he came to our home in June, we would have waited until July to buy my hearing aid. The difference was almost \$200.

He checked the hearing aid and refused to change it. He said the promise to replace it for any other kind was only for a month after the date of purchase. He gave me an adapter which sold for about \$2 and told me that if my hearing aid did not improve with it, then he would fit me with another hearing aid in my good ear for an additional \$185. I told Mr. Restivo, "Oh, no you won't" and walked out.

We left and reported the case to Dade County's Consumer Protection Division. One of the questions in a questionnaire sent to us by that office was whether we had specifically requested a refund. I wanted to make sure of Mr. Restivo's position on the matter before going ahead with the accusation. My husband called Mr. Restivo and again he told him "No refund" and laughed at his request.¹⁹²

* * * * *

Because the hearing aid rule is not yet final, it is too early to tell what specific effects will result from the Council's participation.¹⁹³ Clearly, however, the NCSC did provide consumer testimony which would not have been presented absent public funding and which has been of substantial benefit to the proceedings. To the extent that experienced groups such as the National Council of Senior Citizens are available, such direct funding will be useful to assure that consumers are represented before the Federal Trade Commission.

The Federal Trade Commission should continue to fund consumer groups for participation in its rulemaking. Even with the establishment of an Agency for Consumer Protection, such direct funding will continue to be useful. The Commission's experience is a good model for other agencies which would fulfill their responsibility to protect consumers.

V. Conclusions and Recommendations

Conclusions

The goal of our analysis of the Federal Trade Commission was to evaluate its effectiveness and to identify major deficiencies with respect both to legislative authority and internal changes. It has become apparent to the Subcommittee that, despite some significant problems, the Federal Trade Commission is one of the more effective Federal regulatory agencies in accomplishing its public mission. The Commission's reorganizations and innovations of the early 1970's have attracted talented attorneys and other professionals who are committed to the mission of the agency.

The Commission has made major efforts to investigate and prosecute anti-competitive practices and structures in important sectors of the economy: petroleum products, medical services, occupational

¹⁹² Testimony of Mrs. Nettie Murray in *FTC Hearing Aid Hearings*, at Tr. 4837-44 (May 13, 1976).

¹⁹³ The post-hearing comments are due to the presiding officer on October 22, 1976.

licensing, and automobiles among others. In consumer protection, rule-making proceedings for hearing aids, funerals, prescription drug advertising, and the preservation of consumer's claims promise substantial benefits.

The Subcommittee has identified the following deficiencies:

(1) Substantial and unnecessary delays in antitrust actions are caused by the fact that the Commission seeks enforcement in an administrative rather than a judicial forum.

(2) The Commission's lack of a system for setting future consumer protection priorities may result in less effective use of staff resources, especially for the Regional Offices.

(3) The Commission has failed to exercise sufficiently its rulemaking powers in the Bureau of Consumer Protection.

(4) The Commission's difficulties in securing information from corporations without protracted and expensive litigation have impeded major antitrust enforcement efforts.

(5) The Commission has failed to wield its broadened injunction power as effectively as it could.

(6) The Commission's determination that it is proper to have *ex parte*, off-the-record meetings with prospective respondents while a recommended antitrust complaint is pending has created the appearance of impropriety in at least one instance and perhaps others as well.

(7) The Commission's wording of its "Rules on Clearance for Former Employees" has led to some inconsistent decisions and intrusion of possible conflicts of interest in certain instances.

(8) The Commission has a relatively small budget, compared to the legal resources of the industries which it examines, an important factor in its ability to respond as effectively as possible to antitrust and consumer protection challenges.

Recommendations

(1) The Congress should enact legislation which would allow the Federal Trade Commission to file its antitrust enforcement actions in Federal district court.

(2) The Commission should mandate the Bureau of Consumer Protection to develop a list of priorities for consumer protection or business practices and should insist that staff resources, especially from the Regional Offices, when available, be allocated to actions with high priority.

(3) The Commission should give rulemaking activities major emphasis in the Bureau of Consumer Protection. Administrative cases in this Bureau should be brought only when the economic significance is large and cannot be addressed by a Trade Regulation Rule.

(4) The Congress should enact S. 642, or a similar bill, to enhance the Commission's ability to obtain essential corporate information and to prevent dilatory tactics.

(5) The Commission should seek injunctions whenever it has reason to believe that any statute under its jurisdiction has been violated and that it is in the public interest to enjoin the offensive acts. The Commission's judgment as to the necessity for an injunction is entitled to great weight by the Federal Courts. If the courts continue to

interpret this power more narrowly than Congress intended, the Commission should seek and the Congress should enact legislation to clarify its intent.

(6) The Commission should prohibit *ex parte* contacts between a Commissioner and a proposed respondent once a complaint has been recommended by the Bureau staff.

(7) The Commission should prohibit former employees at the GS-15 level or above from participating, for 2 years after termination in any case which was pending during their employment at the Commission.

(8) The Congress should increase the budget and staff of the Federal Trade Commission to reflect its broad antitrust and consumer protection responsibilities.

FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 4

ENVIRONMENTAL PROTECTION AGENCY

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CHAPTER 4

ENVIRONMENTAL PROTECTION AGENCY

I. Summary

The Environmental Protection Agency (EPA) was created in 1970 by consolidating 15 programs from five departments and agencies. Its mission is to protect and enhance the quality of the environment. The Subcommittee believes that changes are needed in EPA's programs under the Clean Air Act to reduce the volume of pollution from automobile exhausts and, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), to reduce hazardous uses of pesticides.

A. MOBILE SOURCE EMISSION CONTROL

Effective regulation of motor vehicle emissions depends on four complementary enforcement programs (certification, testing at the assembly line, recall, and inspection and maintenance) each specifically authorized by Congress. In combination these programs form a systematic strategy. The first three oblige *manufacturers* to meet standards for vehicles in design, production, and use. The fourth obliges vehicle *users* to conform to standards.

Certification of motor prototypes before mass production is intended to ensure that designs of new cars enable them to meet standards under the Clean Air Act. EPA's certification program as operated absorbs a disproportionately large share of agency resources in relation to its value.

It is also possible to ensure that new car designs meet legal standards by testing motors at the assembly line and by correcting defects in cars that fail at the factory. Unfortunately, objections by the Office of Management and Budget held up approval of the final regulations to govern testing at the assembly line, selective enforcement auditing (SEA). The delay was encouraged by rivalry within EPA. The final standards for SEA are so lenient that they may jeopardize other enforcement programs, especially inspection and maintenance.

Recall of defective cars for repair would ensure that cars continue to meet emission standards. EPA's in-use compliance program (IUCP) at a cost above \$4 million did no more than determine that cars pollute less when properly maintained. Designed to identify recall candidates, EPA declared it a failure, decided to base no recalls on its data, and abandoned the activity. The Agency does not plan to undertake any other comprehensive surveillance program in its recall strategy.

EPA's inspection and maintenance program (to oblige car owners to correct defects that violate clean air standards) currently is so embroiled in legal dispute that its execution is negligible. In effect, the

Act's systematic strategy for regulating motor exhausts has been largely crippled and is limping along on one program, certification, which cannot even ensure that cars coming off the assembly line meet clean air standards.

B. PESTICIDE REGULATION

EPA regulates uses of pesticides and must limit or prohibit those found to cause unreasonable adverse effects. The Agency developed screening criteria to translate the statutory standard, unreasonable adverse effects, into specific terms for regulatory purposes. Of the 1,505 active ingredients in pesticides, 419 have been screened so far and 238 were found hazardous by these criteria. Those 238 amount to one third of the volume and number of registered pesticides marketed.

The Federal Insecticide, Fungicide, and Rodenticide Act prohibits EPA from registering any pesticide before an affirmative determination that it will not cause unreasonable adverse effects. EPA directly contravenes the statute by registering first and asking questions later.

The Act places the burden of proof on the applicant for registration to prove the safety of his product. EPA shifts that burden from registration applicants to the Government, again directly contravening the statute.

The Act gives the EPA Administrator responsibility to make sensitive policy judgments on whether to prohibit or restrict use of any given pesticide. The Administrator has shirked that responsibility. He has preferred in such situations to rely on risk/benefit analysis, an imperfect decisionmaking technique that biases decisionmaking against the public interest.

EPA is by statute required to reregister 35,000 pesticides by October 21, 1977. It will not meet that schedule.

EPA for some time has been revising its policy on decisions involving cancer-causing agents. That policy has been growing progressively less oriented toward public protection.

In sum, the Environmental Protection Agency's regulatory policy is failing to adequately protect the public from unreasonably hazardous exposure to dangerous compounds associated with the use of pesticides.

II. Mandate and Implementation

The Environmental Protection Agency was created by Reorganization Plan No. 3 of 1970.¹ The Reorganization Plan was drafted by President Richard M. Nixon's Advisory Council on Executive Organization, better known as the Ash Council, after its Chairman Roy L. Ash, in the early months of 1970.² On July 9, 1970, President Nixon sent the Reorganization Plan to Congress.³ Neither

¹ 84 Stat. 2086, 35 Fed. Reg. 15623, 5 U.S.C. Appendix (1970).

² J. C. DAVIES III, AND C. F. LETTOW, *THE IMPACT OF FEDERAL INSTITUTIONAL ARRANGEMENTS, FEDERAL ENVIRONMENTAL LAW 140* (Environmental Law Institute 1974).

³ 5 U.S.C. § 903(a) (1970):

When the President, after investigation, finds that—

(1) the transfer of the whole or a part of an agency, or of the whole or a part of the functions thereof, to the jurisdiction and control of another agency;

(2) the abolition of all or a part of the functions of an agency;

(3) the consolidation or coordination of the whole or a part of an agency, or of the whole or a part of the functions thereof, with the whole or a part of another agency or the functions thereof;

(4) the consolidation or coordination of a part of an agency or the functions thereof with another part of the same agency or the functions thereof;

(5) the abolition of the whole or a part of an agency which agency or part does not have, or on the taking effect of the reorganization plan will not have, any functions; is necessary to accomplish one or more of the purposes of section 901(a) of this title, he

the House of Representatives nor the Senate passed a resolution disapproving the plan,⁴ and the Environmental Protection Agency officially came into existence on December 2, 1970,⁵ as an Executive Branch agency.

The Agency received responsibility for major Federal programs to protect the public from environmental hazards associated with pollution of air and water, radiation, noise, pesticides, and solid wastes. Formerly this responsibility had been divided among 15 different programs in five departments and agencies.⁶

In his message on Reorganization Plan No. 3, President Nixon explained the reasons for creating the Environmental Protection Agency:⁷

In the first place, almost every part of government is concerned with the environment in some way, and affects it in some way. Yet each department also has its own primary mission—such as resource development, transportation, health, defense, urban growth or agriculture—which necessarily affects its own view of environmental questions.

* * * * *
Because environmental protection cuts across so many jurisdictions, and because arresting environmental deterioration is of great importance to the quality of life in our country and the world, I believe that in this case a strong, independent agency is needed.

Administrator Russell E. Train, then Chairman of the Council on Environmental Quality, testified before the House Committee on Government Operations on this issue:⁸

Another problem of present Federal organization should be noted. Agencies which have responsibility for promoting a particular resource or activity also have responsibility for regulating the environmental effects of this activity. The two clear examples of this potential conflict of interest are the Department of Agriculture's regulation of pesticides and the Atomic Energy Commission's regulation of radiation levels. Regardless of how good a job these agencies do, the

shall prepare a reorganization plan for the making of the reorganizations as to which he has made findings and which he includes in the plan, and transmit the plan (bearing an identification number) to Congress, together with a declaration that, with respect to each reorganization included in the plan, he has found that the reorganization is necessary to accomplish one or more of the purposes of section 901(a) of this title.
5 U.S.C. § 901(a) (1970):

The President shall from time to time examine the organization of all agencies and shall determine what changes therein are necessary to accomplish the following purposes:

(1) to promote the better execution of the laws, the more effective management of the executive branch and of its agencies and functions, and the expeditious administration of the public business;

(2) to reduce expenditures and promote economy to the fullest extent consistent with the efficient operation of the Government;

(3) to increase the efficiency of the operations of the Government to the fullest extent practicable;

(4) to group, coordinate, and consolidate agencies and functions of the Government, as nearly as may be, according to major purposes;

(5) to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions thereof as may not be necessary for the efficient conduct of the Government; and

(6) to eliminate overlapping and duplication of effort.

4 5 U.S.C. § 906(a) (1970):

Except as otherwise provided under subsection (c) of this section, a reorganization plan is effective at the end of the first period of 60 calendar days of continuous session of Congress after the date on which the plan is transmitted to it unless, between the date of transmittal and the end of the 60-day period, either House passes a resolution stating in substance that that House does not favor the reorganization plan.

5 ENVIRONMENTAL PROTECTION AGENCY. THE CHALLENGE OF THE ENVIRONMENT: A PRIMER ON EPA'S STATUTORY AUTHORITY 1 (1972).

6 Russell E. Train, Administrator, EPA, *Hearings on Regulatory Reform and Oversight of the Environmental Protection Agency Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce*, 94th Cong., 2d Sess., Vol. V, Ser. 94-84, at 19 (1976) [hereinafter cited as *Hearings*].

7 Message of the President Relative to Reorganization Plan No. 3 of 1970, 6 Weekly Compilation of Presidential Documents 908, 5 U.S.C. appendix (1970).

8 Russell E. Train, Chairman, Council on Environmental Quality, *Hearings on Reorganization Plan No. 3 of 1970 Before the Subcommittee on Government Operations of the House Committee on Government Operations*, 91st Cong., 2d Sess. (1970).

public is increasingly questioning the vesting of promotional and regulatory powers in the same agency. The Environmental Protection Agency, by assuming these regulatory functions, should help restore public confidence in our ability to control pollution from these sources.

The primary mission of the newly formed EPA was to protect the environment, to arrest environmental deterioration. As evidenced by the statements of President Nixon and Mr. Train it was to be a *strong, independent* regulatory agency.

EPA is the largest of the nine agencies covered in this report. Its budget is larger than the sum of the other eight.⁹ The Agency has had more than 9,000 permanent employees since 1974 and is expected to continue to expand.¹⁰

TABLE I.—ENVIRONMENTAL PROTECTION AGENCY, BUDGET AUTHORITY

(In thousands of dollars)

	1971 actual ¹	1972 actual ¹	1973 actual ¹	1974 actual ¹	1975 actual ¹	1976 actual ²	Transition quarter ³ (July 1, to Sept. 30, 1976) actual	1977 actual
Total not including construc- tion grants.....	288,784	447,520	527,221	618,948	850,336	771,520	188,586	773,405
Construction grants.....	1,000,000	2,000,099	6,900,000	5,333,770	7,666,230			
Total, Environmental Protection Agency...³	1,288,781	2,447,476	7,427,143	5,952,445	8,516,362	771,520	188,586	773,405

¹ Source: U.S. Budget.² Source: Environmental Protection Agency.³ The sum of construction grant funds plus total not including construction grant funds does not equal the total Environmental Protection Agency budget because the total figure reflects deductions.

TABLE II.—Environmental Protection Agency

Total permanent employment, end of year:	Manpower ¹
1971 (actual).....	5,959
1972 (actual).....	7,835
1973 (actual).....	8,270
1974 (actual).....	9,144
1975 (actual).....	9,160
1976 (estimated).....	9,550
1977 (estimated).....	9,550

¹ Source: U.S. Budget.

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	Budget authority ¹ 1975 actual
Food and Drug Administration total Federal funds.....	\$200,897,000
Federal Communications Commission.....	46,875,000
National Highway Traffic Safety Administration: total Federal funds..	45,014,000
Securities and Exchange Commission.....	44,404,000
Interstate Commerce Commission.....	42,784,000
Federal Trade Commission.....	38,954,000
Consumer Product Safety Commission.....	36,952,000
Federal Power Commission.....	33,164,000
Total not including Environmental Protection Agency.....	489,044,000
Environmental Protection Agency.....	² 850,336,000

¹ Source: U.S. budget.² Total not including construction grants. With construction grants the EPA total budget authority is \$8,516,362,000.¹⁰ See Table II.

Since 1970, new statutes have broadened the scope of the authority EPA inherited. The Clean Air Act, as amended in 1970,¹¹ is designed to protect and enhance the quality of the Nation's air resources. The objective of the Federal Water Pollution Control Act, as amended in 1972,¹² is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The Safe Drinking Water Act of 1974¹³ was enacted to ensure safe, high quality, drinking water. The Federal Insecticide, Fungicide, and Rodenticide Act¹⁴ regulates the use of pesticides and limits or prohibits use of pesticides found to cause unreasonable adverse effects on man or the environment. The purpose of the Solid Waste Disposal Act, as amended by the Resource Recovery Act of 1970,¹⁵ is to preserve and enhance the quality of air, water, and land resources by promoting constructive solid waste management and resource recovery systems. The Noise Control Act of 1972¹⁶ declares it to be the policy of the United States to promote an environment for all Americans free from noise that jeopardizes health or well-being. The EPA radiation program is designed to prevent avoidable and unnecessary public exposure to environmental sources of ionizing radiation.¹⁷ Even a brief summary of the Acts administered by EPA suggests the extraordinary diversity and complexity of EPA's responsibilities. The number of recent statutory enactments dealing with the environment emphasizes the continuing concern of the Congress for environmental quality.

From the outset, the Environmental Protection Agency has been beset by critics. The Office of Management and Budget in the Executive Office of the President has periodically restructured EPA's priorities through review of its budget and regulations.¹⁸ Congress has amended EPA's statutory mandates to curtail its authority.¹⁹ Industries regulated by EPA use a variety of tactics to limit EPA's powers and to cushion the effects of environmental legislation. Environmentalists through legislation and litigation attempt to strengthen environmental statutes and to force EPA to exercise its full authority. All parties, including State and local governments, Federal agencies, industry, and environmentalists, take the Agency to court to compel it either to do that which it chooses not to do or to restrain it from doing that which it proposes to do.²⁰

The Environmental Protection Agency's state of health, after nearly 6 years of siege, is the subject of this inquiry. Is EPA in fact a strong, independent regulatory agency? How effective has it been? What are its weaknesses? How may it be improved?

Subcommittee staff members interviewed more than 20 of the EPA staff and many others well informed about the work of the Agency. The Subcommittee's June 1975 questionnaire and updated responses provided an important additional source of information. On April 2,

¹¹ 42 U.S.C. §§ 1857-1858a (1974).

¹² 33 U.S.C. §§ 1251-1376 (1974).

¹³ 42 U.S.C. §§ 300f-i-8 (1974).

¹⁴ 7 U.S.C. §§ 121-136v (1974).

¹⁵ 42 U.S.C. §§ 3251-3259 (1974).

¹⁶ 42 U.S.C. §§ 4901-4918 (1974).

¹⁷ *Hearings, supra* note 6, at 25.

¹⁸ See text at pp. 121, 133 *infra*.

¹⁹ See text accompanying notes 179-181 *infra*.

²⁰ E.g., on December 3, 1970, one day after EPA formally came into existence, it received a petition from the Environmental Defense Fund requesting the cancellation and immediate suspension of all uses of Aldrin-Dieldrin.

1976, and on April 26, 1976, the Subcommittee held hearings to assess the Agency's implementation of its legislative mandate.²¹ On June 9, 1976, Chairman Moss addressed additional written questions to Administrator Train.²²

In association with a general analysis of the Agency and its performance, the Subcommittee selected several major EPA programs for detailed analysis. These were selected because the issues profoundly affect public health and well-being and afford a useful means of evaluating the Agency's effectiveness.

III. Case Studies

A. MOBILE SOURCE EMISSION CONTROL

1. Introduction

The primary purpose of the Clean Air Act is ". . . to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."²³ To achieve that purpose, the Clean Air Act authorizes the Environmental Protection Agency to regulate emission of air pollutants from stationary sources and from moving sources. Regulation of mobile source emissions involves: (1) setting standards for emission of air pollutants which "cause or contribute to, or . . . [are] . . . likely to cause or contribute to, air pollution which endangers the public health or welfare",²⁴ (2) enforcing compliance with the emission standards; and (3) controlling motor vehicle use as a means of reducing polluting emissions. The Subcommittee review focused on enforcement.²⁵

The Clean Air Act sets out a comprehensive plan to enforce compliance with mobile source emission standards. The plan, as noted, has four major parts: (1) certification,²⁶ (2) testing at the assembly line,²⁷ (3) recall,²⁸ and (4) inspection and maintenance.²⁹ The certification program is intended to ensure that motor vehicles are designed to meet emission standards. Assembly line testing is intended to ensure that design capability is realized in manufacture, that new production vehicles meet emission standards. Recall would ensure that vehicles, if properly maintained and used, meet emission standards throughout their useful life. Finally, inspection and maintenance is intended to ensure that vehicles in operation are properly maintained and used. Effective compliance enforcement currently depends on execution of each of the four complementing programs, all expressly authorized by Congress, combining to form a systematic strategy.

²¹ *Hearings, supra* note 6.

²² *Hearings, supra* note 6, at Appendix D.

²³ 42 U.S.C.A. § 1857(b)(1) (1974).

²⁴ 42 U.S.C.A. § 1857 f-1(a) (1974).

²⁵ This case study focuses on specific aspects of EPA's Enforcement program. An EPA prepared overview of its Enforcement program generally is published in *Hearings, supra* note 6, at Appendix B.

²⁶ See text p. 119 *infra*.

²⁷ See text pp. 119-25 *infra*.

²⁸ See text pp. 125-30 *infra*.

²⁹ See text pp. 130-33 *infra*.

2. Certification

Certification is intended to ensure that motor vehicles are so designed as to conform to emission standards.³⁰ Section 206(a)(1) of the Clean Air Act directs the Administrator to "... test, or require to be tested ... any new motor vehicle or new motor vehicle engine ... to determine whether such vehicle or engine conforms ..."³¹ to standards set by section 202. If the vehicle or engine conforms, the Administrator is to issue a certificate. As Administrator Russell E. Train described certification's utility:³²

Certification testing of preproduction prototypes can assure that a manufacturer is capable of designing vehicles which meet emission standards and can identify nonconforming classes of vehicles *before the investment in mass production is made*. Prototype testing cannot assure that new mass-produced vehicles will meet standards. (Emphasis added.)

Certification saves manufacturers money by discouraging investment in products whose designs render them incapable of meeting standards and by reducing costs they might otherwise incur in repair of nonconforming cars built for the market. However, certification cannot ensure that an effective prototype design is carried through to mass production. To ensure all cars meet standards, each must be tested as it comes off the assembly line. Testing of a representative sample may at least inspire confidence that nearly all cars conform if the sample demonstrates a high percentage of conformity.

3. Testing at the assembly line

The testing of new cars as they emerge from the assembly line is authorized by section 206(b)(1) of the Act.³³ The Administrator may suspend or revoke the certificate for an entire lot of cars if a representative sample of new motor vehicles or their engines fails to pass the test.³⁴ Without a certificate, a car may not be sold in the United States.³⁵

On July 20, 1976, Administrator Train approved final regulations for testing at the assembly line,³⁶ nearly 6 years after enactment of Clean Air Act section 206(b)(1),³⁷ and more than 30 months after the Agency's testing at the assembly line regulations had first been published in proposed form.³⁸ These delays are explained chiefly by excessive Office of Management and Budget (OMB) intervention in EPA decisionmaking³⁹ and by apparent rivalry within EPA between program offices sharing responsibility for control of engine exhausts.⁴⁰

³⁰ "The Administrator shall by regulation prescribe (and from time to time revise) ... standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment causes or contributes to, or is likely to contribute to, air pollution which endangers the public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life. . . ." 42 U.S.C.A. § 1857f-1(a) (1974).

³¹ 42 U.S.C.A. § 1857f-5(a)(1) (1974).

³² Letter from EPA Administrator Russell E. Train to OMB Director James T. Lynn, May 27, 1976.

³³ 42 U.S.C.A. § 1857f-5(b)(1) (1974).

³⁴ 42 U.S.C.A. § 1857f-5(b)(2) (1974).

³⁵ 42 U.S.C.A. § 1857f-2(a)(1) (1974).

³⁶ 41 Fed. Reg. 31472 (July 28, 1976).

³⁷ Section 206 was added Dec. 31, 1970, by Public Law 91-604, § 8(a), 84 Stat. 1694.

³⁸ See 39 Fed. Reg. 45360 (Dec. 31, 1974).

³⁹ See text pp. 121-23 *infra*.

⁴⁰ See text pp. 123-24 *infra*.

The testing procedure adopted by the Agency is referred to as Selective Enforcement Auditing (SEA). These regulations differ from the traditional concept of testing at the assembly line.

EPA states that: ⁴¹

... while ... [traditional testing at the assembly line] ... contemplates testing *all or some representative sample* of vehicles coming off the production line in a continuous fashion, SEA would be limited to testing representative samples of particular vehicle configurations *on a selective basis*. (Emphasis added.)

Train explained: ⁴²

[i]n the absence of evidence of excessive failure rates, only about 800 vehicles [annually] (less than 0.01 percent of production) will be required by EPA to be tested. SEA is primarily a deterrent to noncompliance which derives its power not from pervasive Federal presence, but rather from the fact that any of a manufacturer's vehicles may be subjected to an emissions test audit at virtually any time.

The SEA program is projected to cost the government \$700,000 per year.⁴³ The projected cost to manufacturers is approximately \$1,600,000 per year for testing and \$15,000,000 to \$20,000,000 per year for modifications of nonconforming vehicles.⁴⁴ These figures compare to an approximate \$2 billion increase in aggregate sticker price to pay for the equipment needed to ensure that cars meet the emission standards for 1976 model years.⁴⁵ SEA will cost the government and manufacturers a modest 1% of the total increased cost to ensure that the consumer gets what he or she pays for.

In announcing his approval of the final SEA regulations, Administrator Train reported that, according to manufacturers' own data, more than half a million new 1976 model year cars failed to conform to the standards set by the new SEA regulations.⁴⁶

That is not to say that only half a million 1976 model year vehicles fail to conform to the Clean Air Act section 202 standard. The SEA standards are far more lenient. EPA explained the method of selecting vehicles for SEA testing: ⁴⁷

[o]nce a particular "configuration" (same type engine, emission control system, transmission and weight class) has been identified by EPA for testing, a specified number of those vehicles will be randomly chosen from the production of a single plant. The testing may then be done by either the manufacturer or EPA.

In order to satisfy the SEA requirements, only 60% of the vehicles tested, selected from a given vehicle configuration, must conform to the Clean Air Act section 202 emission standards.⁴⁸ Therefore, the more than half a million vehicles that failed manufacturers' assembly-line-testing represent the most extreme violations of the standard: sets of vehicles that could not conform to standards even 60% of the time. Moreover, the EPA believes that manufacturers' estimates understate the percentage of nonconforming vehicles.

Administrator Train cautioned that manufacturers' data "cannot be regarded as objective indicators of compliance rates."⁴⁹ His con-

⁴¹ 39 Fed. Reg. 45360, 45361 (1974).

⁴² See note 32 *supra*.

⁴³ Letter from EPA Administrator Russell E. Train to OMB Director James T. Lynn, May 10, 1976.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ EPA Press Release of July 20, 1976.

⁴⁷ *Id.*

⁴⁸ 41 Fed. Reg. 31472, 31474 (July 28, 1976).

⁴⁹ See note 32 *supra*.

clusion followed, in part, a recent investigation by EPA of data submitted by American Motors.⁵⁰ The investigation revealed, "procedural shortcomings, faulty equipment, inadequate management controls, and erroneous data which understated the actual emission levels of the tested vehicles."⁵¹

The record demonstrates the need for reliable testing at the assembly line. Doubts as to assembly-line-test data provided by the manufacturer emphasize the need for uniform procedures and close monitoring of the tests. The moderate cost to the government for management and to the manufacturers for testing, as compared with the high cost to consumers for emission control hardware, emphasizes the economy of the SEA investment. The estimated \$15,000,000 to \$20,000,000 per year that will be spent to modify those vehicles that fail at the factory is much less than it would cost to recall those same vehicles from the dealer or buyer.

Finally, EPA estimates of SEA cost/effectiveness (cost per ton of pollutant removed) confirm the value of assembly-line-testing.⁵² Why then did 30 months elapse between the publication of the proposed SEA regulations and approval of the final regulations?

As noted above, the delay was caused, in part, by the Office of Management and Budget (OMB). OMB derives its authority from its position in the Executive Office of the President. On October 5, 1971, OMB's then Director, George P. Shultz, sent to the heads of departments and agencies (including EPA) a memorandum which established a procedure for interagency review of "proposed agency regulations, standards, guidelines and similar materials pertaining

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² The following table and explanatory text from Administrator Train's May 10, 1976, letter to OMB Director Lynn elucidate:

PRELIMINARY ESTIMATE OF INCREMENTAL COST-EFFECTIVENESS (DOLLAR PER TON) OF ALTERNATIVE CONTROL STRATEGIES

	SEA impact if cars perform at 1975 levels without SEA*	SEA impact if cars perform at 1976 levels without SEA*	Reduction in light duty vehicle standards from—		Reduction in heavy duty truck standard from present level to proposed level
			1975 Fed. (1.5/15/3.1) to 1975 Calif. (0.9/9.0/2.0)	1975 Fed. (1.5/15/3.1) to Statutory (0.41/3.4/0.40)	
Hydrocarbons.....	\$23.62	\$24.23	\$197	\$437	\$20-23
Carbon monoxide...	6.68	7.75	20	41	8
Oxides of nitrogen..	41.71	55.92	107	165	104-202

*Based on Chrysler data.

Whether SEA is worth the cost ultimately depends on the value of cleaning up the air to the extent that SEA would do so. In lieu of good data on the value of clean air, some perspective can be gained by comparing the marginal or incremental cost of clean-up using SEA with the incremental cost of clean-up that is considered acceptable in other policy decisions. These incremental costs per ton removed are shown in the attached table, with the SEA figures computed using two alternative assumptions about what assembly line performance would be without SEA (the first column assumes that, without SEA, assembly line production in the future would be comparable to the levels achieved by 1975 model year cars, while the second column assumes the levels achieved by 1976 cars). The cost-effectiveness numbers displayed for other regulations in the table are provided only to give some perspective on how much other incremental actions cost on a dollar-per-ton basis.

As a result of the incremental cost-effectiveness analysis displayed in the table, SEA is clearly cost-effective.

to environmental quality, consumer protection, and occupational and public health and safety.”⁵³ The stated purpose of interagency review is to improve interagency coordination. But OMB in its role as manager of the interagency review can and does exercise considerable influence on EPA priorities. OMB’s review of the SEA regulations nearly prevented their issuance.

On January 12, 1976, interagency review was initiated by transmission of the SEA regulations to other agencies for comment.⁵⁴ Comments were received by February 10, 1976. On February 25, 1976, the complete SEA package was transmitted to OMB.⁵⁵ The document never emerged from OMB. On July 20, 1976, Administrator Train, in an exceedingly rare procedure, signed the final SEA regulations despite OMB’s objection,⁵⁶ 146 days after he sent the SEA package to OMB.

There is irony in that the day after the SEA package was sent to OMB, EPA Assistant Administrator Alvin L. Alm had reported to the other EPA Assistant Administrators and Office Directors: “The median time for completion of OMB review has been 18 days.”⁵⁷ Assistant Administrator Alm continued, “[t]he median time between transmission of regulations to agencies for comment [including OMB’s 18 days] and the Administrator’s approval has been 104 days.”⁵⁸

OMB’s 146 day review of the final SEA regulations, terminated only by Administrator Train’s unilateral approval of the regulations, appears to constitute an attempt to interfere with the Administrator’s legislatively-imposed mandate.

On April 26, 1976, at the Subcommittee’s hearings regarding the EPA, Chairman Moss observed that OMB “. . . appear[ed] to be functioning . . . as a sort of super-legislative body”⁵⁹ in its treatment of the final SEA regulations. On April 30, 1976, Chairman Moss wrote OMB Director James T. Lynn to express his concern that OMB had delayed the final SEA regulations more than 2 months and to inquire into the cause of the delay.⁶⁰ OMB officials later asserted that an internal EPA study found SEA not to be cost/effective.⁶¹ On May 18, 1976, Director James T. Lynn, in his response to Chairman John E. Moss’s April 30, 1976, letter, quoted the EPA study:⁶²

if preceded by certification neither the Selective Enforcement Auditing program nor the recall program appears to be cost effective in terms of providing additional control of regulated pollutants.

⁵³ Memorandum from OMB Director George P. Shultz to Heads of Departments and Agencies, Oct. 5, 1971.

⁵⁴ Telephone conversation with Walter C. Barber, Director, Standards and Regulations Division, Office of Planning and Evaluation, Office of Planning and Management, EPA, July 19, 1976.

⁵⁵ *Id.*

⁵⁶ *Cf.* note 46 *supra*.

⁵⁷ Memorandum from Alvin L. Alm, Assistant Administrator for Planning and Management, EPA, to Assistant Administrators and Office Directors, EPA, Feb. 26, 1976.

⁵⁸ *Id.*

⁵⁹ *See Hearings supra* note 6, at 136.

⁶⁰ Letter from Subcommittee on Oversight and Investigations Chairman John E. Moss to OMB Director James T. Lynn, April 30, 1976.

⁶¹ May 5, 1976, meeting between subcommittee staff and James L. Mitchell, Associate Director for Natural Resources, Energy and Science, OMB; Donald E. Crabill, Deputy Associate Director, Natural Resources Division, OMB; and Jim J. Tozzi, Branch Chief for Environment, Natural Resources Division, OMB.

⁶² Letter from OMB Director James T. Lynn to Subcommittee on Oversight and Investigations Chairman John E. Moss, May 18, 1976.

The study was later identified as a draft "Mobile Source Emission Control Strategy Paper" written by Eric O. Stork, Deputy Assistant Administrator for Mobile Source Air Pollution Control (Stork paper).⁶³

Under an arrangement that is dubious at best, the Office of Mobile Source Air Pollution Control, headed by Stork, within the Office of Air and Waste Management, shares responsibility with the Office of Mobile Source and Noise Enforcement, headed by Dr. Norman D. Shutler, Deputy Assistant Administrator, within the Office of Enforcement, for emission control. Stork's office manages the certification program and is responsible for the aborted "in-use compliance program,"⁶⁴ which was intended primarily to develop a comprehensive data base for possible recall actions. Shutler's office now manages the recall program, has primary responsibility for EPA's inspection and maintenance program, and will manage the SEA program. The Stork strategy paper was, in part, a rebuttal to an earlier draft, "EPA Automobile Emission Control and Enforcement Strategy"⁶⁵ written by Shutler (Shutler paper).

Since the passage of the Clean Air Amendments of 1970, certification has been the principal technique used by EPA to enforce compliance with emission standards.⁶⁶ In fiscal years 1975 and 1976, EPA allocated approximately 75 percent of its mobile source emission control budget to certification.⁶⁷ But the responsibility for mobile source emission control within EPA has been slowly shifting from the Stork office to the Shutler office. Primary responsibility for the recall program shifted to the Shutler office after the Stork office's in-use compliance program failed at a cost of more than \$4 million.⁶⁸ The installment of the SEA program in the Shutler office threatened to reduce even further the budget and authority of the Stork office.

The Stork paper is dated February 13, 1976. On February 25, 1976, the SEA interagency review package was sent to OMB.⁶⁹ The Stork paper was a draft that had not been approved by Stork's immediate superior, Assistant Administrator for Air and Waste Management, Roger Strelow, or by Administrator Train. It did not represent official EPA policy. Moreover, it did not present a credible cost-effectiveness analysis.

Administrator Train, in his letter of May 10, 1976, to OMB Director Lynn, deprecated the Stork paper and urged the advisability of proceeding with SEA. Train wrote that the Stork analysis⁷⁰

Underestimate[d] the effectiveness of SEA by not incorporating potential improvements in performance of model lines not tested . . . ;

Overestimate[d] the cost per car by assuming \$30 per car to repair failed vehicles rather than about \$4 per car for calibration and hardware changes made prior to assembly line tests to lower the risk of failure;

Credit[ed] the Certification process with all the clean-up actually achieved in the field, but not with all the cost needed to meet the standards (this was under-

⁶³ Eric O. Stork, Mobile Source Emission Control Strategy Paper (Feb. 13, 1976).

⁶⁴ See text pp. 125-30 *infra*.

⁶⁵ Dr. Norman D. Shutler, EPA Automobile Emission Control and Enforcement Strategy (June 13, 1975).

⁶⁶ 39 Fed. Reg. 45360 (Dec. 31, 1974).

⁶⁷ See note 63 *supra*.

⁶⁸ See text pp. 125-30 *infra*.

⁶⁹ See note 54 *supra*.

⁷⁰ See note 43 *supra*.

standably done because of the lack of data indicating the difference in costs and in effectiveness with and without Certification)

Train closed his May 10, 1976, letter to Lynn by endorsing the cost effectiveness of SEA and recommending its implementation.

The May 10, 1976, letter was followed by a May 12, 1976, meeting between the EPA Administrator and the OMB Director.⁷¹ At that meeting Lynn raised questions regarding the need for the SEA regulations.⁷²

On May 27, 1976, Administrator Train wrote the OMB Director a second letter in an effort to answer these questions and to justify the SEA program. The May 27, 1976, letter was a six page detailed exposition of the need for SEA. Administrator Train concluded that:⁷³

We have been trying for more than seven years to make motor vehicles meet emission standards in-use, and we have been involved in assembly line testing program development and rulemaking for more than three years. We are convinced that SEA is needed and that it represents the most cost effective and least burdensome approach to assuring emissions compliance of new production vehicles that has yet been advanced.

Off-the-record communications between EPA and OMB with regard to the SEA program continued, but Train, the official vested with legal authority to approve the regulations, was unable to secure OMB approval.

OMB officials, to justify their actions, asserted that the statutory language for testing at the assembly line made that program discretionary, in contrast to the statutory language for certification, which made that program mandatory.⁷⁴ Section 206(a)(1) of the Clean Air Act does provide that the Administrator "shall" conduct certification testing and "shall" certify conforming vehicles,⁷⁵ while by contrast, section 206(b)(1) "authorizes" the Administrator to test vehicles at the assembly line.⁷⁶

OMB's assertions notwithstanding, that difference in statutory terminology does not divest the Administrator of his authority to test vehicles at the assembly line and revest that authority in the President or in the OMB. On June 24, 1976, Senator Edmund S. Muskie, Chairman of the Subcommittee on Environmental Pollution of the Senate Committee on Public Works, wrote to Train to inquire about the status of the final SEA regulations and to express concern over the delay.⁷⁷

Chairman Muskie wrote:⁷⁸

Section 206(b)(1) is written to "authorize" rather than "mandate" the institution of an assembly line test procedure by the Administrator. However, the Committee fully intended and expected that such a test procedure would in fact be instituted because this regulatory authority is an integral part of the entire regulatory scheme for dealing with auto pollution. At the same time, we wished to provide reasonable flexibility to the Administrator to determine the exact timing and details of the institution of the procedure.

⁷¹ See note 32 *supra*.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See note 61 *supra*.

⁷⁵ 42 U.S.C.A. § 1857f-5(a)(1) (1974).

⁷⁶ 42 U.S.C.A. § 1857f-5(b)(1) (1974).

⁷⁷ Letter from Subcommittee on Environmental Pollution Chairman Edmund S. Muskie to EPA Administrator Russell E. Train, June 24, 1976.

⁷⁸ *Id.*

Chairman Muskie emphasized, "I understand . . . that proposal has undergone an extensive period of interagency review under the auspices of OMB. Any reasonable period for review has long since passed."⁷⁹ Section 206(b)(1) of the Clean Air Act clearly vests authority for final decision on SEA in the Administrator. OMB's prolonged review of the final SEA regulations constituted an attempt extra-legislatively to preempt that authority.

The final SEA regulations will affect only the most egregious violations of emission standards.⁸⁰ The SEA regulations proposed December 31, 1974, would have had far more force, as they would have required 90 percent of the test vehicles, selected from a given vehicle configuration, to conform to emission standards.⁸¹ The final regulations require only a 60 percent compliance rate.⁸² EPA explained its decision to promulgate the lenient emission performance standard by stating that it "... is being set in order to implement SEA in a manner not unreasonably burdensome to the auto companies."⁸³ One can only speculate on the factors which degraded the SEA standard, on the effect of interagency review or the controversy within EPA; but there is no guesswork involved in concluding that OMB and internal EPA strife caused excessive and unreasonable delay in approval of EPA's regulations to establish testing at the assembly line.

4. Recall

Recall is an enforcement technique designed to ensure that motor vehicles properly maintained in use comply with the emission standards mandated by section 202 of the Clean Air Act.⁸⁴ Recall is specifically authorized by section 207(c)(1) of the Clean Air Act:⁸⁵

If the Administrator determines that a *substantial number* of any class or category of vehicles or engines, although *properly maintained and used*, do not conform to the regulations prescribed under section 202, when *in actual use* throughout their useful life . . . , he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicle or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer. If the manufacturer disagrees with such determination of nonconformity and so advises the Administrator, the Administrator shall afford the manufacturer and other interested persons an opportunity to present their views and evidence in support thereof at a public hearing. Unless, as a result of such hearing the Administrator withdraws such determination of nonconformity, he shall within 60 days after the completion of such hearing, order the manufacturer to provide prompt notification of such nonconformity (Emphasis added.)

Disputes concerning interpretation of "substantial number" and "properly maintained and used" are likely to be major issues in any contested recall action.

EPA has had only one comprehensive program to develop data to serve as the basis for possible recall: the in-use compliance program

⁷⁹ *Id.*

⁸⁰ See text accompanying note 48 *supra*.

⁸¹ 39 Fed. Reg. 45360 (1974).

⁸² See text accompanying note 48 *supra*.

⁸³ 41 Fed. Reg. 31472 (July 28, 1976).

⁸⁴ See note 30 *supra*.

⁸⁵ 42 U.S.C.A. § 1857f-5a(c)(1) (1974).

(IUCP). An effective inspection and maintenance program (I/M)⁸⁶ would develop data about a substantial number of vehicles and engines in actual use, but it would not show how vehicles properly maintained and used perform, for I/M tests emissions of vehicles of all conditions. The premise upon which I/M is based—that properly maintained vehicles will comply with the emission standards—is what IUCP was designed to verify. Neither certification nor testing at the assembly line (SEA) provide information about how vehicles actually on the road perform.

At the request of the Subcommittee, the General Accounting Office (GAO) reviewed EPA's two major programs for the surveillance of in-use motor vehicle exhaust emissions: I/M and IUCP. The General Accounting Office's findings relative to I/M are discussed below.⁸⁷ Here we consider GAO's review of the IUCP and the Subcommittee's follow-up investigation and findings.

EPA has conducted two IUCP's: the 1972 and the 1973 (fiscal years in which each was funded).⁸⁸ Testing in both was performed by independent contractors. In testimony before the Subcommittee on April 7, 1976, the GAO gave this description of the 1972 IUCP:⁸⁹

Under the 1972 program about 3,000 foreign and domestic 1972 model year automobiles were tested at a cost of about \$2.1 million by three contractors at five different test sites—Atlanta, Detroit, Los Angeles, Philadelphia, and St. Louis. The contracts specified that 125 vehicles were to be tested in each of 24 different engine classes. The 24 classes of engines represented about 70 percent of the engines used in 1972 model year automobiles. Testing began in January 1973 and was completed in October 1973. Retesting was completed in March 1974.

EPA's office of Mobile Source Air Pollution Control concluded from its review of the test data that 5 of the 24 classes of vehicles tested, or approximately 1,400,000 vehicles, should be considered candidates for recall because they did not comply with emission standards.⁹⁰ EPA notified the manufacturers of the nonconforming vehicles but did not require them to submit a recall plan according to section 207(c) (1) of the Clean Air Act.⁹¹ Had EPA done so, and had the affected manufacturers decided to contest EPA's determination of nonconformity, then all interested persons would have had an opportunity to present arguments at a public hearing. Instead, EPA met with manufacturers in private and provided vehicle test files and supporting documents to its potential adversaries.⁹² By not setting into motion the statutory process that results in a public hearing, EPA effectively precluded public participation.

Moreover, EPA withheld from the public the names of engine classes it identified as candidates for recall. On April 26, 1976, the Subcommittee questioned the wisdom of this policy. Subcommittee counsel pointed out that, in contrast, the National Highway Traffic Safety Administration (NHTSA) issues a periodic press release listing makes and models of vehicles under "current investigation for alleged safety-related defects."⁹³

⁸⁶ See pp. 130–33 *infra* for a detailed discussion of I/M.

⁸⁷ *Id.*

⁸⁸ *Hearings, supra* note 6, at 6.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See text accompanying note 85 *supra*.

⁹² *Hearings, supra* note 6, at 6.

⁹³ *Id.* at 137.

Subcommittee counsel asked whether EPA was aware that NHTSA's policy has enabled NHTSA to gather significant additional information without causing injury to manufacturers by disclosure.⁹⁴ EPA Deputy Assistant Administrator for Mobile Source and Noise Enforcement, Dr. Norman D. Shutler, responded that EPA was aware of the NHTSA policy, but that EPA had determined that the potential harm to manufacturers was greater than the potential benefit public information might produce. On June 28, 1976, however, Assistant Administrator for Enforcement, Stanley W. Legro, by letter notified Chairman Moss of the Subcommittee:⁹⁵

We have concluded that publication of investigations would be beneficial in helping the public understand our functions and should lead to a substantially greater flow of new information to the Agency regarding emissions related problems. In addition, there have been apparently no significant adverse impacts from the National Highway Traffic Safety Administration policy of publicly reporting defects investigations in progress. Therefore, we have decided to begin publishing on a quarterly basis listings of formal recall investigations in progress.

Public notice was first given in a press release on June 25, 1976.

When notified by EPA that their vehicles were among those identified by the 1972 IUCP as not conforming with emission standards, the affected manufacturers questioned the validity of some of the test data. EPA responded by conducting a second review of the recall data. The GAO testified that EPA was less than satisfied with 215 of the 535 relevant tests.⁹⁶ In January, 1975, EPA conducted a mock hearing to assess the difficulties that it might encounter in an actual section 207 hearing.⁹⁷ The mock hearing further reduced EPA's confidence in the 1972 IUCP test data. Finally, in June, 1975, EPA determined that it could not base any recall action on the 1972 IUCP.⁹⁸

The General Accounting Office described the 1973 IUCP as follows:⁹⁹

Under the 1973 program about 2,500 vehicles were tested by two contractors at the same five test sites as the 1972 program at a cost to date of \$1.9 million. Thirty-one different classes of 1972, 1973, and 1974 engines were tested. In March 1974 the contractors began nine months of testing. Because of problems experienced in the 1972 program, EPA required the contractors to submit test data on a weekly basis.

The 1973 IUCP testing began in March, 1974, the same month and year that the 1972 IUCP retesting ended.¹⁰⁰

EPA reviewed the 1973 IUCP test data and concluded that 7 engine classes, or approximately 2,300,000 vehicles, were exceeding the emission standards.¹⁰¹ Though this review was completed in July, 1975, EPA did not decide whether to order recall until the following June. On June 28, 1976, the EPA notified the Subcommittee that "[a] decision has been made not to recall those classes of vehicles on the basis of the IUCP data."¹⁰² EPA identified "major contractor integrity problems" and "numerous deviations from testing protocols by the contractors" as the reason for its decision.¹⁰³

⁹⁴ *Id.*

⁹⁵ *Id.* at Appendix A.

⁹⁶ *Id.* at 6.

⁹⁷ *Id.* at 7.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at Appendix A.

¹⁰³ *Id.*

The GAO had noted three basic reasons why the 1972 IUCP could not serve as the basis for recall:¹⁰⁴

(1) The 1972 program was EPA's initial effort to test in-use automobiles. EPA did not fully anticipate the data needed to support a recall.

(2) EPA provided only limited monitoring of contractors' test activities, and contractors asserted that EPA did not formally advise them of problems identified during site visits.

(3) EPA did not make an in-depth review of contractors' test data until all the tests were completed. As a result, the contractors believed they were adequately performing the tests.

The GAO has not yet completed its review of the 1973 IUCP. It did testify, however, that EPA spent only one and one-half days per month monitoring test activities at each test site during the 1972 IUCP and only two days per month during the 1973 IUCP.¹⁰⁵ As stated by Deputy Assistant Administrator Stork, the EPA official specifically responsible for the IUCP's: "[f]or the 1972 and 1973 IUCP's the available staffing was barely adequate to make occasional visits to contractor testing sites. . . ." ¹⁰⁶ It is plain, then, that EPA's monitoring of the 1973 IUCP was no more extensive than its monitoring of the 1972 IUCP. It is equally clear that flaws associated with contractor integrity and deviations from testing protocols¹⁰⁷ could have been reduced by effective monitoring. EPA planned and managed both IUCP's. It must assume major responsibility for their failures.¹⁰⁸

EPA spent \$4,000,000 in contract funds on the IUCP's.¹⁰⁹ It spent uncounted additional resources in planning and managing the IUCP contracts, reviewing the IUCP data, and deciding not to base recalls on either IUCP.¹¹⁰ From the time IUCP was conceived to the time the decision not to base recalls on the 1973 IUCP was reached, 5½ years elapsed.¹¹¹ Deputy Assistant Administrator Stork posed and answered the evident question: "What did EPA get out of the IUCP . . . ?" "Obviously," he said, "we learned painful lessons on how to better run an IUCP."¹¹² But the Agency is not conducting and does not plan to conduct another IUCP.¹¹³

The two Assistant Administrators who share responsibility for EPA's mobile source emissions program concluded in a memorandum to Administrator Train: "[O]ne can reasonably conclude from these [IUCP] data . . . that it is important—from an emission control standpoint—to assure that cars are properly maintained."¹¹⁴ Deputy

¹⁰⁴ *Id.* at 7.

¹⁰⁵ *Id.* at 6-7.

¹⁰⁶ Memorandum of Feb. 11, 1976, from Eric O. Stork, Deputy Assistant Administrator for Mobile Source Air Pollution Control, to Robert G. Ryan, Director, Office of Legislation, regarding briefing of Administrator Russell E. Train for April 7, 1976, hearing before the Subcommittee.

¹⁰⁷ See text accompanying note 103 *supra*.

¹⁰⁸ "As regards the 1973 IUCP data, at least some of the problems that were encountered in the 1972 program were not repeated. However, the 1973 IUCP testing was completed before the full lessons (recognized at the January 1975 mock hearing) were known." See note 106 *supra*.

¹⁰⁹ *Hearings, supra* note 6, at 6-7. EPA estimated a total of approximately \$4,200,000. See note 108 *supra*.

¹¹⁰ The Mobile Source Enforcement Division reported that 4-6 man-years were consumed by its efforts alone to determine the usefulness of the 1972 IUCP data. See note 65 *supra* at 17.

¹¹¹ Compare note 106 *supra* at 1 with *Hearings supra* note 6 at Appendix A.

¹¹² See note 106 *supra* at 4.

¹¹³ *Id.* at 3.

¹¹⁴ Memorandum of July 8, 1975, from Roger Strelow, Assistant Administrator for Air and Waste Management, and Robert Baum, Acting Assistant Administrator for Enforcement, to Russell E. Train, Administrator.

Assistant Administrator Stork echoed that vehicles in a "less-than-adequate" state of maintenance tend to exceed emission standards more than tuned up vehicles.¹¹⁵ He continued:¹¹⁶

This underscores the need for finding ways of assuring that in-use cars are properly maintained, and thus the need for the implementation of State and local inspection and maintenance programs that would promote such maintenance.

If EPA cannot verify by surveillance that properly maintained vehicles will comply with emission standards, it should not ask vehicle owners to bear the cost of repairing conditions that may have been caused by neglectful manufacture rather than by improper maintenance and use.

IUCP is perhaps not essential to an effective recall program. Less comprehensive surveillance can generate data sufficient to satisfy the requirements of the recall section of the Clean Air Act. But a comprehensive emission surveillance program on the order of the IUCP's is, in theory, an indispensable prerequisite to an inspection and maintenance program. As presently conceived, inspection and maintenance is intended to compel corrective repairs by vehicle owners.

If owners can be asked justifiably to bear the cost of repair only when EPA can prove that vehicles of their class comply with standards when properly maintained, the inspection and maintenance program will affect only those classes of vehicles whose conformance in use has been demonstrated under EPA's comprehensive surveillance.

If this premise is correct, then EPA's decision to abandon comprehensive surveillance¹¹⁷ must be understood as one which may significantly affect its ability to require maintenance and repair by owners and to enforce the Clean Air Act.

Assistant Administrator for Enforcement, Stanley W. Legro, Deputy Assistant Administrator for Mobile Source and Noise Enforcement, Norman D. Shutler, and Acting Division Director for Mobile Source Enforcement, Benjamin R. Jackson, disagree with this premise.¹¹⁸ They state that, under the Clean Air Act section 207 warranty program,¹¹⁹ vehicle owners who maintain engines as instructed will not have to pay for repair should their vehicles fail to conform to standards, provided they can document that the maintenance was performed. Only vehicle owners unwilling to pay for maintenance will suffer penalties.

However, EPA does not intend to verify that vehicles properly maintained will conform to the Clean Air Act section 202 emission standards. Moreover, the lenient emission performance standards set by SEA will not ensure that vehicles sold to the public meet Section 202 standards at the factory.¹²⁰ For this reason, the Subcommittee believes the Agency should reinstate comprehensive surveillance.

¹¹⁵ See note 106 *supra* at 5.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 3.

¹¹⁸ July 16, 1976, meeting between Subcommittee staff and Stanley W. Legro, Assistant Administrator for Enforcement; Norman D. Shutler, Deputy Assistant Administrator for Mobile Source and Noise Enforcement; and Benjamin R. Jackson, Acting Division Director for Mobile Source Enforcement.

¹¹⁹ 42 U.S.C.A. § 1857f-5a (1974).

¹²⁰ See text p. 125 *supra*.

5. *Inspection and maintenance*

The inspection and maintenance program (I/M) involves periodic inspection of motor vehicles to determine whether their exhaust emissions comply with Federal standards¹²¹ and requires repair by the owner¹²² of those vehicles which violate the standards.

The June 13, 1975, draft of the Agency "Motor Vehicle Emission Control and Enforcement Strategy" concluded:¹²³

It seems clear that I/M [Inspection and Maintenance] is the single most important incremental component of a comprehensive strategy. Not only can I/M apparently accomplish more in direct emissions reductions than any other strategy, but I/M is also a significant support program for SEA [Selective Enforcement Auditing (assembly line testing)], recall, and warranties.

I/M is the only comprehensive program designed to oblige the owner of a vehicle to correct exhaust emissions that violate the standards.¹²⁴

It is managed by the States in accord with the Clean Air Act which emphasizes the State role in achieving the national air quality standards:¹²⁵

Each state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Each State plan in order to qualify for EPA approval must provide ". . . to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards. . . ." ¹²⁶ The House Report on the bill elucidated ¹²⁷

[T]he legislation provides that States must require inspection of motor vehicles in actual use if the . . . [Administrator], after consultation with the State, determines that the achievement of ambient air quality standards requires such inspection and that such inspection is technologically and economically feasible.

I/M programs are included in implementation plans of 17 States and the District of Columbia.¹²⁸

At the request of the Subcommittee, GAO reviewed the Agency's two major programs for the surveillance of in-use motor vehicle exhaust emissions: I/M and the in-use compliance program (IUCP),

¹²¹ See note 30 *supra*.

¹²² I/M will also discourage tampering with pollution control hardware. See Clean Air Act section 203(a) (3), 42 U.S.C. 1857f-2(a) (3) (1974).

¹²³ See note 65 *supra*.

¹²⁴ Dramatic emission performance degradation of in-use vehicles emphasizes the need for I/M. See, e.g., EPA Environmental News (press release) of July 21, 1976:

"Environmental Protection Agency Administrator Russell E. Train today called on Ford, Chrysler, and General Motors to take appropriate corrective action because large percentages of their 1975 cars are exceeding the Federal emission standard for carbon monoxide (CO).

"Of the 77 Chrysler cars tested, 83 percent failed the CO standard by an average of 177 percent. Of the 124 Ford cars tested, 43 percent failed the standard by an average of 27 percent. Of the 229 General Motors cars tested, 49 percent failed the standard by an average of 61 percent. Of all the cars tested for all manufacturers, only six percent had been driven more than 25,000 miles and the average sample was only 9,000. Under the Clean Air Act, new cars are supposed to be able to meet Federal emission standards for 50,000 miles when properly maintained and operated."

¹²⁵ 42 U.S.C.A. § 1857c-2(a) (1974).

¹²⁶ 42 U.S.C.A. § 1857c-5(a) (2) (G) (1974).

¹²⁷ H. Rep. No. 1146, 91st Cong., 2d sess. 3-4 (1970).

¹²⁸ Hearings, *supra* note 6, at 4.

as discussed above.¹²⁹ With respect to I/M, GAO testified on April 7, 1976, that "EPA officials agree that progress in establishing inspection/maintenance programs has been minimal."¹³⁰

The lack of progress is explained principally by the dispute over the extent of EPA's authority. The issue is whether the agency has statutory authority to require States either to enact, as State law, EPA-imposed plans or¹³¹ to administer and enforce their voluntary or imposed plans; and, if so, whether Congress' grant of such authority to the agency is consistent with the Constitution. The United States Court of Appeals for the Third Circuit has held that EPA had the statutory authority to require Pennsylvania to enforce its plan and that the Congressional grant of such authority was constitutional.¹³² However, both the Ninth Circuit¹³³ and Fourth Circuit¹³⁴ Courts of Appeals held that the agency lacks *statutory* authority to require States to enforce the pertinent parts of their plans and thereby avoided the constitutional issue. The Ninth Circuit nevertheless did express its view of the constitutional question by declaring that the broad interpretation of the Commerce Clause urged by EPA "... would reduce the States to puppets of a ventriloquist Congress."¹³⁵ Similarly, the Fourth Circuit stated that it was of the opinion that the constitutional validity of the EPA regulations at issue was "very doubtful at the very best."¹³⁶ Further the District of Columbia Circuit Court has held:¹³⁷

The inspection and maintenance regulations . . . are invalid to the extent that they direct unconsenting states to enact regulations and thus go beyond the authority conferred by the Act, and in part because they require the states to administer and enforce federal regulatory programs and thus exceed constitutional power under the commerce clause.

On June 1, 1976, the United States Supreme Court granted certiorari.¹³⁸ The fate of state I/M programs will remain uncertain until the Supreme Court's resolution of the issue.

The plans under consideration by the District of Columbia Circuit contained provisions which provided that the state "... shall not register or allow to operate on public streets or highways . . . [noncomplying] . . . vehicle[s]. . . ." ¹³⁹ "A State may comply with the prohibition on registering nonconforming vehicles," the court declared, "merely by requiring applicants for vehicle registration to submit a certificate of compliance obtained from federal officials or from

¹²⁹ See text p. 126 *et seq.*

¹³⁰ Hearings, *supra* note 6, at 4.

¹³¹ See 42 U.S.C.A. § 1857c-5(c)(1):

"The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standards within the time prescribed.

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(II) of this section.

¹³² *Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974).

¹³³ *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975).

¹³⁴ *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975).

¹³⁵ 521 F.2d at 839.

¹³⁶ 530 F.2d at 226.

¹³⁷ *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975).

¹³⁸ 44 U.S.L.W. 3685 (U.S. June 1, 1976).

¹³⁹ *E.g.*, 40 C.F.R. § 52.490(d) (1975).

private sources not manned by state personnel.”¹⁴⁰ At that point the District of Columbia Circuit drew the line between impermissible Federal encroachment on State sovereignty and legitimate regulation of commerce by the Congress. The Ninth Circuit had made a similar distinction in its discussion of the constitutional issues. The court quoted Professor Henry M. Hart, Jr.:¹⁴¹

Federal law often says to the states, “Don’t do any of these things,” leaving outside the scope of its prohibition a wide range of alternative courses of action. But it is illuminating to observe how rarely it says, “Do *this* thing,” leaving no choice but to go ahead and do it. The *Federalist* papers bear ample witness to the Framers awareness of the delicacy, and the difficulties of enforcement, of affirmative mandates from a federal government to the government of the member states.

The Fourth Circuit echoed the Ninth Circuit:¹⁴²

It should be noted that many forms of pressure on the states have been held not to violate those rights preserved by the Tenth Amendment. . . . The alternative whip of economic pressure and seductive favor was approved in . . . many . . . cases. Statutes are common which invite state regulation or administration in lieu of federal control . . . or which withhold federal aid for failure to comply with federal standards. . . .

Both the Ninth Circuit and the Fourth Circuit suggested ways by which EPA could legitimately apply inspection and maintenance programs without direct Federal administration and enforcement. The District of Columbia Circuit’s resolution of the issue, however, suggests that a solely Federal inspection and maintenance program may be required to carry out the law.

Concerning EPA’s authority to itself administer and enforce a federally-based I/M program, the Third Circuit made a statement in passing which the District of Columbia Circuit apparently understood to suggest that a federal I/M program might not be constitutional.¹⁴³ The District of Columbia Circuit forcefully and correctly responded to the Third Circuit’s statement:¹⁴⁴

We do not agree with the statement in *Pennsylvania v. EPA*, 500 F. 2d 246 (3d Cir. 1974), that direct federal enforcement of the retrofit and inspection programs would not “represent less of an intrusion upon state sovereignty.” *Id.* at 263. The principle at work here is not that the states have an interest in keeping the federal government from regulating vehicles owned by their citizens but rather that they are to be protected from federal compulsion to exercise state governmental functions in an area where they choose to remain inactive.

Since the federal government acts under its commerce power when it enforces its own regulations against vehicle owners, *direct federal regulation by definition involves no intrusion on state sovereignty whatsoever.* (Emphasis added.)

Adequate authority notwithstanding, EPA has neither allocated the resources nor exhibited the inclination to execute a Federal I/M program. Administrator Russell E. Train declared:¹⁴⁵

¹⁴⁰ 521 F.2d at 991-92.

¹⁴¹ Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 515-16 (1954) (footnotes omitted) as quoted in *Brown v. EPA*, 521 F.2d 841 (9th Cir. 1975).

¹⁴² 530 F.2d at 228.

¹⁴³ “The only alternative implementation would be for the Federal Government to assume some of the functions of traffic control and vehicle registration and directly enforce the programs contained in the various transportation control plans. The Administrator has determined that this would not be a practicable way of attaining national air quality standards . . . and we fail to see how this would impose less of an intrusion upon state sovereignty.” 500 F.2d at 262-63 (emphasis added).

¹⁴⁴ 521 F.2d at 994, n. 27.

¹⁴⁵ *Transportation and Land Use Controls; Texas Plan*, 28 Fed. Reg. 30633 (1973).

Direct Federal enforcement and massive, duplicative Federal programs aimed at vehicles on an individual basis were not the means contemplated by the act to solve these problems.

EPA expects to fund the fiscal year 1977 I/M program at approximately \$250,000.¹⁴⁶ The Office of Management and Budget (OMB), in its review of the fiscal year 1977 budget submission, disapproved EPA's proposed grant program of \$10,000,000 to assist states in the implementation of I/M programs¹⁴⁷ and precluded the use of other EPA funds to support I/M.¹⁴⁸ EPA did not appeal OMB's disapproval of State grant funds, but it did appeal OMB's decision that I/M be stripped of funding altogether.¹⁴⁹ Although EPA's appeal succeeded,¹⁵⁰ the funding level finally authorized for I/M is clearly inadequate to support an I/M program unassisted by the States. If the Supreme Court's determination of the issues is wholly unfavorable to EPA, both EPA and OMB should promptly reconsider their positions regarding a Federal I/M program. On July 16, 1976, Assistant Administrator Stanley Legro expressed a continuing commitment to I/M and a willingness to consider a completely Federal operation if necessary.¹⁵¹

Although the eventual shape of I/M programs cannot now be defined, EPA should not lose sight of I/M's significance. The June 13, 1975, draft EPA Motor Vehicle Emission Control and Enforcement Strategy recommended that I/M be elevated to the "... #1 priority strategy within the Agency, in the eyes of the Congress, and in the minds of the people for achieving reductions in mobile source pollutants."¹⁵² Whatever the outcome of the judicial entanglements concerning I/M, EPA should endeavor to achieve a comprehensive and effective I/M program.

6. Conclusion

Effective enforcement of motor vehicle air pollutant emission standards depends on execution of four related EPA programs.

(1) Certification's share of EPA's mobile source emission control budget has been disproportionately large compared with its usefulness. Testing of preproduction prototypes alone cannot ensure that new vehicles at the factory will meet emission standards.

(2) EPA's selective enforcement auditing program for testing at the assembly line will not ensure that vehicles in mass production meet emission standards. Selective Enforcement Auditing requires that only 60% of vehicles tested conform to the Section 202 standards. Administrator Train disclosed that EPA decided to accept a 60% compliance rate, "[i]n order to implement SEA in a manner not unreasonably burdensome to the auto companies."

(3) The weak 60% standard may affect the Agency's recall power.¹⁵³ The Agency insists that the 60% compliance rate "[i]s intended to apply only to SEA and should not be construed as being applicable to

¹⁴⁶ *Hearings*, *supra* note 6, at 4.

¹⁴⁷ *Id.* at 129. For an overview of OMB decisions to increase or decrease Environmental Protection Agency funds and personnel see Appendix A-3 *infra*.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 135.

¹⁵¹ See note 117 *supra*.

¹⁵² See note 65 *supra* at 38.

¹⁵³ 51 Fed. Reg. 31472, 31474 (July 28, 1976).

other enforcement provisions established by the Clean Air Act.” (Emphasis added.)¹⁵⁴ Before a recall may be ordered under section 207(c) of the Clean Air Act, EPA must first determine that a “substantial number of any class or category of vehicles or engines”¹⁵⁵ fail to conform to the emission standards.

Though the manufacturer is unquestionably responsible for their conformance at the factory, responsibility for conformance in use is less obvious. Since EPA found it would be “unreasonably burdensome” to manufacturers to require better than 60 percent compliance at the factory under SEA, it is illogical to assume that, for purposes of recall, it would impose a more stringent standard on vehicles in use. The “substantial number” required by section 207(c) for a recall may be modified, then, by an additional requirement that the substantial number of vehicles must represent at least 40 percent of the vehicles examined. EPA’s insistence that the SEA regulations will not affect “other enforcement provisions established by the Clean Air Act” unaccountably ignores this logic.

(4) For more than 5½ years EPA devoted its resources to the in-use compliance program as the principal technique to develop data to serve as the basis for possible recalls of vehicles in violation of emission standards. It spent in excess of \$4,000,000 in contract fees alone on this program. Yet, EPA decided that no recalls could be based on the data so acquired. “[W]e learned painful lessons on how to better run an IUCP,” declared Deputy Assistant Administrator Stork.¹⁵⁶ But EPA is not presently conducting and does not plan to conduct another in-use compliance program. The final product of the multi-million dollar investment was a determination of the obvious: that “. . . one can reasonably conclude . . . that it is important—from an emission control standpoint—to assure that cars are properly maintained.”¹⁵⁷

(5) The Inspection and Maintenance program—“the single most important incremental component of a comprehensive [mobile source emission control] strategy”¹⁵⁸—has been brought to a halt by legal entanglements. Whatever shape the program finally takes following review by the Supreme Court, its success will hinge on EPA’s ability to assign responsibility for violations of the Clean Air Act standards.

The Acts strategy for control of emissions from automobiles has been so crippled by the combination of EPA’s poor performance, OMB’s interference, contractors’ failures, and States’ objections, that the standards simply are not being enforced.

B. PESTICIDE REGULATION

1. Introduction

More than 35,000 pesticide compounds¹⁵⁹ employing 1,500 active ingredients¹⁶⁰ are marketed annually in the United States. Pesticide

¹⁵⁴ 41 Fed. Reg. 31472, 31475-76 (July 28, 1976).

¹⁵⁵ See text accompanying note 83 *supra*.

¹⁵⁶ See note 106 *supra*.

¹⁵⁷ See note 114 *supra*.

¹⁵⁸ See note 65 *supra*.

¹⁵⁹ Rebuttable Presumption Against Registration Fact Sheet, EPA Press Release (July 29, 1976).

¹⁶⁰ Data Requirements to Support Registration of Pesticide Active Ingredients and Preliminary Schedule of Call-Ins, 41 Fed. Reg. 7218 (Feb. 17, 1976).

sales in 1975 exceeded 1.3 billion pounds¹⁶¹ at a market value above \$2.3 billion dollars.¹⁶² Agriculture consumes more than 50 percent of end use sales. Residential and institutional consumers and exports account for the remainder in roughly equal parts.¹⁶³ It is EPA's responsibility to regulate the uses of pesticides in the United States and to limit or prohibit use of pesticides found to cause unreasonable adverse effects.¹⁶⁴

Although pesticides can be of great benefit to man, many pesticides pose significant risks to man and the environment. Recognizing that, Congress in 1972 enacted the Federal Environmental Pesticide Control Act (FEPCA)¹⁶⁵ as amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)¹⁶⁶ to reflect the growing concern with the harm unregulated pesticide use can cause.

No pesticide products may be sold in the United States unless registered with the Administrator of EPA.¹⁶⁷ FIFRA, as amended, requires the Administrator to reregister and reclassify for general or restricted use¹⁶⁸ the more than 35,000 pesticide products that were registered according to the terms of FIFRA in force prior to implementation of the 1972 amendments. The original deadline for re-registration and reclassification was October 21, 1976, but Congress in 1975 extended the deadline one year.¹⁶⁹

The Administrator may register or reregister a pesticide only if he determines that it will not cause *unreasonable adverse effects*¹⁷⁰ on man or the environment. In order to translate the statutory standard of unreasonable adverse effects into a manageable regulatory approach, EPA has developed screening or measuring criteria to determine whether pesticides are acutely or chronically toxic.¹⁷¹ These screening criteria, or risk criteria as they are called by the regulations,¹⁷² if triggered raise a legal presumption against new or continued registration of a pesticide compound because of toxicity. The pesticide registrant or new registration applicant may attempt to rebut the presumption against registration¹⁷³ and may also try to show that, despite the pesticide's toxicity, the economic, social, and environmental benefits of the pesticide "outweigh the risk" associated with its use.¹⁷⁴ If the Administrator determines that the registrant or applicant failed to rebut the presumption of toxicity or failed to show benefits to outweigh the risks, he will give notice that he intends to deny registration or cancel registration of the pesticide.¹⁷⁵ The applicant or registrant has the right to a hearing if he wishes to contest this deci-

¹⁶¹ UNITED STATES INTERNATIONAL TRADE COMMISSION, PRELIMINARY REPORT ON PESTICIDES AND RELATED PRODUCTS, SYNTHETIC ORGANIC CHEMICALS, U.S. PRODUCTION AND SALES, 1975, at 2 (1976).

¹⁶² *Id.*

¹⁶³ WILLIAM BLAIR AND COMPANY, THE PESTICIDE INDUSTRY—AN OVERVIEW at 1 (1975).

¹⁶⁴ 7 U.S.C. §§ 121-136y (1976).

¹⁶⁵ Act of Oct. 21, 1972, Public Law 92-516, 86 Stat. 973, amending 7 U.S.C. §§ 121-136y (1976).

¹⁶⁶ 7 U.S.C. §§ 121-136y (1976).

¹⁶⁷ 7 U.S.C. § 136a(a) (1976).

¹⁶⁸ 7 U.S.C. § 136a(d) (1976).

¹⁶⁹ Act of Nov. 28, 1975, Public Law 94-140, § 4(ii), 89 Stat. 752, amending 7 U.S.C. § 136 n. (c)(2) (1976).

¹⁷⁰ 7 U.S.C. § 136a(c)(5) (1976).

¹⁷¹ Regulations for the Enforcement of the Federal Insecticide, Fungicide, and Rodenticide Act, Registration, Reregistration and Classification Procedures, Section 162.11, 40 Fed. Reg. 28242 (1975).

¹⁷² *Id.*

¹⁷³ *Id.* at § 162.11(a)(4).

¹⁷⁴ *Id.* at § 162.11(a)(5)(iii).

¹⁷⁵ *Id.*

sion. In that event, a decision on registration or restricted use issued after the hearing is final.¹⁷⁶

The Subcommittee has studied EPA's implementation of the 1972 amendments to FIFRA. Chairman Moss, on June 9, 1976, addressed detailed written questions to Administrator Train regarding EPA's regulation of pesticides.¹⁷⁷ Administrator Train responded in similar detail by letter dated August 3, 1976.¹⁷⁸

The Subcommittee's study and investigation focused on the following issues:

- (1) Whether a significant percentage of all pesticides currently registered trigger EPA's risk criteria for acute or chronic toxicity;

- (2) Whether EPA is adhering to FIFRA's mandate that pesticide products not be registered unless found not to cause unreasonable adverse effects on man or the environment.

- (3) Whether EPA is adhering to FIFRA's mandate that imposes on registration applicants the burden of proof on the issue of a pesticide's safety;

- (4) Whether risk/benefit analysis is an appropriate decision making method in the context of pesticides regulation;

- (5) Whether the FIFRA deadline for reregistration and reclassification of all pesticides will be met;

- (6) Whether EPA's developing cancer policy adequately protects the public.

Each of the above issues is discussed in chronological order so that the configuration of EPA's developing pesticide program may be perceived.

2. Pesticides program

On July 23, 1975, H.R. 8841, to extend the FIFRA authorization, was introduced in the United States House of Representatives and referred to the House Committee on Agriculture.¹⁷⁹ Within a week, a proposal to divest EPA of much of its pesticide regulatory authority began to materialize. A draft amendment to H.R. 8841 would have required the EPA Administrator to obtain the Secretary of Agriculture's concurrence before issuing a notice of intent to cancel a registration, change a pesticide classification, or hold a hearing to determine if either of those actions should be taken.¹⁸⁰ The Secretary of Agriculture's concurrence would also have been required on all regulations prescribed to carry out the provisions of FIFRA, as amended in 1972 by FEPCA.¹⁸¹ In effect, the proposed amendment would have given the Secretary of Agriculture absolute veto power over pesticide regulatory decisions proposed by the Administrator of EPA. The Department of Agriculture had regulatory responsibility for pesticides before EPA was formed in 1970. Its regulation of pesticides had been characterized in 1970 by Russell E. Train, while Chairman of the Council on Environmental Quality, as one of two "clear examples" of a "potential conflict of interest" where promotional and

¹⁷⁶ 7 U.S.C. § 136d(b) (1976).

¹⁷⁷ *Hearings*, *supra* note 6, at Appendix D.

¹⁷⁸ *Id.*

¹⁷⁹ 121 Cong. Rec. H7367 (July 23, 1975).

¹⁸⁰ See Business Meetings on the Federal Insecticide, Fungicide, and Rodenticide Act Extension Before the House Committee on Agriculture, 94th Cong., 1st sess. 124 (1975).

¹⁸¹ *Id.*

regulatory powers were vested in the same agency.¹⁸² President Nixon, in his message on Reorganization Plan No. 3, had specifically noted that the Department of Agriculture's primary mission is the promotion of agriculture—thus emphasizing the need for a “strong, independent agency” whose primary mission would be environmental protection.¹⁸³

Administrator Train requested the opportunity to address the Committee on Agriculture. On July 30, 1975, in an unusual appearance before the ordinary business session of the Committee, he presented his arguments against the proposed amendment¹⁸⁴ and recounted the circumstances attending the 1970 decision to divest the Department of Agriculture of authority to regulate pesticides.

On September 4, 1975, the Committee on Agriculture voted down the amendment by a vote of 23 to 18,¹⁸⁵ but it was not until October 9, 1975, when the amendment was offered and defeated on the floor of the House, that EPA was certain that it would retain, at least temporarily, its pesticide regulatory authority.¹⁸⁶ H.R. 8841 as enacted did impose new limitations on EPA's authority. Before the EPA Administrator may issue a public notice of his intent to cancel a pesticide registration or to change a pesticide classification, and before he may issue a public notice of intent to hold a hearing to determine whether to cancel a pesticide registration or change a pesticide classification, he must first, 60 days prior to making such public notice, send it to the Secretary of Agriculture and a Scientific Advisory Panel, created by H.R. 8841,¹⁸⁷ for comment.¹⁸⁸ In addition, 60 days prior to publication in the *Federal Register*, all regulations, proposed and final, must be provided to the Secretary of Agriculture, the House Committee on Agriculture, the Senate Committee on Agriculture and Forestry, and the Scientific Advisory Panel for comment.¹⁸⁹

Apparently in response to the attempt to amend H.R. 8841, on October 10, 1975, Train introduced major changes of policy affecting pesticide cancellation and suspension procedures.¹⁹⁰ On the same day, he introduced a new EPA policy on decisions affecting agents believed to cause cancer.¹⁹¹ One of the memoranda initiating these changes¹⁹² stripped the Office of General Counsel of authority it had until then, with the Administrator's sanction, exercised with respect to the agency's policy on pesticides registration, cancellation, and suspension.¹⁹³ The memorandum charged that the adversary hearing process

¹⁸² See text accompanying note 8 *supra*.

¹⁸³ See text accompanying note 7 *supra*.

¹⁸⁴ See note 180 *supra* at 123.

¹⁸⁵ *Id.* at 185.

¹⁸⁶ 121 Cong. Rec. H9899 (Oct. 9, 1975).

¹⁸⁷ Act of Nov. 28, 1975, Public Law 94-140, § 7, 89 Stat. 753, amending 7 U.S.C. § 136 (codified at 7 U.S.C. § 136w (1976)).

¹⁸⁸ Act of Nov. 28, 1975, Public Law 94-140, § 1, 89 Stat. 751, amending 7 U.S.C. § 136 (codified at 7 U.S.C. § 136d (1976)).

¹⁸⁹ Act of Nov. 28, 1975, Public Law 94-140, §§ 2, 6, and 7, 89 Stat. 752-53, amending 7 U.S.C. § 136 (codified at 7 U.S.C. § 136w (1976)).

¹⁹⁰ Memorandum from Russell E. Train, Administrator, to Andrew W. Breidenbach, Assistant Administrator for Water and Hazardous Materials, Robert V. Zener, General Counsel, Alvin L. Alm, Assistant Administrator for Planning and Management, Oct. 10, 1975 [hereinafter cited as Oct. 10 Cancellation Memorandum].

¹⁹¹ Memorandum from Russell E. Train, Administrator, EPA to Assistant Administrators, Regional Administrators, Office Directors, Oct. 10, 1975 [hereafter cited as Oct. 10 Cancer Memorandum].

¹⁹² See note 190 *supra*.

¹⁹³ *Id.*

was responsible for "misconceptions by the public" and was inhibiting effective public involvement.¹⁹⁴ The Administrator promised to increase personal contacts with affected parties, "particularly the farm community."¹⁹⁵ The Office of General Counsel was restricted to the role of manager of adjudicatory hearings.¹⁹⁶

The Office of General Counsel has been credited with the cancellation of DDT, Aldrin and Dieldrin, and with the suspension of Heptachlor and Chlordane.¹⁹⁷ Considered in the wake of the H.R. 8841 episode, this may explain the reallocation of pesticide responsibilities. The first consequence of Train's October 10, 1975 action was the departure by the three lead attorneys for pesticides in the Office of General Counsel.

Effective February 5, 1976, Jeffrey H. Howard, Associate General Counsel for Pesticides, Toxic Substances, and Solid Waste Management; Frank J. Sizemore, Deputy Associate General Counsel for Pesticides, Toxic Substances, and Solid Waste Management; and William E. Reukauf, Senior Trial Attorney for Pesticides, Toxic Substances, and Solid Waste Management, resigned from EPA:¹⁹⁸

... because of the continued failure of EPA to take effective action under its existing authority to regulate toxic chemicals in water, in air, in human and animal foods as well as in drinking water. It is clear from recent actions, that the Agency intends to refrain from vigorous enforcement of available toxic substances control and to retrench from the few legal precedents which it has set for evaluating the cancer hazards posed by chemicals.

The flurry of activity on October 10, 1975, and the resignations of the attorneys serve as background for the events to follow.

On July 3, 1975, the regulations (effective August 4, 1975) defining procedures for pesticides registration, reregistration, and classification were published in the *Federal Register*.¹⁹⁹ The preamble discussion of the screening criteria for risk described in the regulations states:²⁰⁰

... the term "oncogenic" [tumor causing] is used in the regulations because the Administrator had determined that the distinction between "benign" and "malignant" tumors is not meaningful in determining the hazard of cancer to man on the basis of tests conducted on a laboratory species, given the "increasing evidence that many tumors can develop into cancers."

The screening criteria were designed to make manageable EPA's review of pesticides to determine whether a new registration should be granted or an existing registration cancelled.²⁰¹ Despite the policy resolving the distinction between "benign" and "malignant" growths in assessing cancer risks, Administrator Train, on April 22, 1976, reversed his stance. He declared that oncogenicity would no longer be a

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ "[A]ccording to some who have been intimately involved in trying to bring pesticides under effective regulatory control, one can hardly overstate the importance of the OGC's [Office of General Counsel's] role in EPA's cancelling the registration of DDT and aldrin and dieldrin for most uses, and more recently, its suspending most uses of heptachlor and chlordane as an 'imminent hazard.' There would have been no cancellations or suspensions without the OGC to act as a catalyst, says William A. Butler, a Washington attorney for the Environmental Defense Fund." 191 *SCIENCE* 1155, 1156 (Mar. 19, 1976).

¹⁹⁸ Hearings on EPA's Implementation of the Pesticides Control Act Before the Subcomm. on Conservation, Energy, and Natural Resources of the House Comm. on Government Operations, 94th Cong., 2d sess. (1976).

¹⁹⁹ 40 *Fed. Reg.* 28242 (1975).

²⁰⁰ *Id.* at 28263.

²⁰¹ *Id.*, Section 162.11, at 28281.

valid criterion in the context of cancellation proceedings.²⁰² Whether the procedural formalities in cancellation proceedings are likely to be significantly affected or the ultimate substantive outcome changed by this shift in EPA policy is not yet clear. It is apparent, though, that the forces of change (which the three EPA attorneys who resigned had predicted) had found expression, however subtle, in the Agency's cancer policy.

EPA's cancer policy, developed pursuant to Administrator Train's October 10, 1975, directive, was published in the May 25, 1976, *Federal Register*.²⁰³ The May 25, 1976, notice is entitled Health Risk and Economic Impact Assessments of Suspected Carcinogens (cancer-causing agents). The notice is divided into three sections: Interim Administrative Procedures for Regulatory Decisions Involving Suspected Carcinogens; Interim Guideline for Carcinogen Risk Assessment; and Interim Guideline for Economic Impact Analysis for Proposed Regulatory Actions to Control Carcinogenic Pesticides.

The Interim Guideline for Carcinogen Risk Assessment makes official EPA's decision to distinguish between benign and malignant tumors.²⁰⁴ It describes the general framework EPA will follow in developing an analysis of carcinogenic risks. The assessment of risk is supposed to provide answers to the following questions:²⁰⁵

(1) How likely is the agent to be a human carcinogen?

(2) If the agent is a human carcinogen, what is the estimated impact on human health?

The answers, which the Interim Guideline assumes science can supply, are to be the basis for defining risk in risk/benefit analysis. However, mathematical precision cannot be achieved in risk assessment. Moreover, even if it could be, risk/benefit analysis as a decisionmaking technique is not an acceptable substitute for substantive, qualitative judgment. The EPA Interim Guideline for Carcinogen Risk Assessment states:²⁰⁶

[t]he available techniques for assessing the magnitude of cancer risk to human populations on the basis of animal data only are very crude due to uncertainties in the extrapolation of dose-response data to very low dose levels and also because of differences in levels of susceptibility of animals and humans. Hence, the risk estimates should be regarded only as rough indications of effect.

The National Cancer Institute National Cancer Advisory Board's Subcommittee on Environmental Carcinogenesis on June 2, 1976, made public its "General Criteria for Assessing the Evidence for Carcinogenicity of Chemical Substances," which fully support the EPA's policy insofar as extrapolation is concerned.²⁰⁷ The document states,

[q]uantitative extrapolation from animal studies for the purpose of evaluating human risks entails large uncertainties at the present time.

Scientists have acknowledged forthrightly their limitations in this function. Yet the pesticide regulations require more, quantification of

²⁰² Administrator's Decision on Interlocutory Appeal Affirming Denial of Respondent's Requests to Take Official Notice, April 22, 1976.

²⁰³ Health Risk and Economic Impact Assessments of Suspected Carcinogens, 41 Fed. Reg. 21402 (May 25, 1976).

²⁰⁴ *Id.* at 21404.

²⁰⁵ *Id.* at 21405.

²⁰⁶ *Id.* at 21404.

²⁰⁷ National Cancer Institute National Cancer Advisory Board Subcommittee on Environmental Carcinogenesis, National Cancer Institute, General Criteria for Assessing the Evidence for Carcinogenicity of Chemical Substances 8, — J. Nat'l. Cancer Institute — (1976).

risk, so that risk can be weighed against benefit to achieve calculated decisions.²⁰⁸

Harold P. Green, Professor of Law and Director of the Law, Science and Technology Program at George Washington University, observed that ". . . risks, by their very nature, tend to be relatively remote and speculative, especially where the technology is new or where epidemiological data are not yet available. . . ." ²⁰⁹ This observation is particularly pertinent to the assessment of carcinogenic risks. Moreover, Professor Green's conclusion that in such assessments quantified benefits will almost always outweigh quantified risks is most significant.²¹⁰ The ritual of balancing risk against benefit in the process of decisionmaking for regulation of pesticides tends to institutionalize a bias against the public health.

Use of the term "risk" in place of the more commonly used term "cost" in the analytical equation is telling. Merely a cursory examination of the economic analysis prescribed by the Guideline ²¹¹ reveals that many important costs are omitted from the equation.

The purpose of the Interim Guideline for Economic Impact Analysis of Proposed Regulatory Actions to Control Carcinogenic Pesticides is to define the factors to be considered and the procedures to be followed in assessing the economic consequences of regulatory actions affecting carcinogenic pesticides. The guideline explicitly states, "[t]he impacts on pesticide manufacturers are not germane to this type of regulatory decision, in which the risk of the use of a pesticide is compared to the benefit of those uses."²¹² The economic analysis is to contain:²¹³

(1) Identification of the major uses of the pesticide, including estimated quantities used by crop or other application.

(2) Preliminary identification of the minor uses of the pesticide, including estimated quantities used by category such as lawn and garden uses and household uses.

(3) Identification of registered alternative products for the uses set forth in (1) and (2) above, including an estimate of their availability.

(4) Determination of the change in costs to the use [*sic*] ²¹⁴ of providing equivalent pesticide treatment with any available substitute products.

(5) Assessment of regulation impact upon user productivity (e.g., yield per acre and/or total output) from using available substitute pesticides or from using no other pesticide.

(6) If the impacts upon either user costs or productivity are significant, a qualitative assessment of the regulation's impact on production of major agricultural commodities and retail food prices of such commodities.

The Economic Impact Analysis Guideline part of the policy is as notable for what it omits as for what it includes.

²⁰⁸ Section 162.11(n)(5), (6), 40 Fed. Reg. 28282 (1975).

²⁰⁹ Green, *The Risk-Benefit Calculus in Safety Determinations*, 43 Geo. Wash. L. Rev. 791, 804 (1975).

²¹⁰ *Id.*

²¹¹ See text accompanying note 213 *infra*.

²¹² 41 Fed. Reg. 21405 (May 25, 1976).

²¹³ *Id.*

²¹⁴ The word "user" should apparently be substituted for "use."

The National Cancer Institute has estimated that annual expenditures for disease-related cancer costs will run "... well into the tens of billions of dollars."²¹⁵ Dr. Frank J. Ranscher, Jr., Director of the Institute, testified that an estimated \$1 billion will be spent for cancer research in the United States during 1976.²¹⁶ These are but two of many such costs that are not considered in the Economic Impact Analysis Guideline. Moreover, the Guideline makes no reference to death, suffering, or environmental degradation.

The Administrator of EPA is uniquely situated to appraise cumulative environmental stresses. He has ready access to more information on environmental pollution and its effects than any other individual. Yet, the aggregate effect of environmental pollution (caused by permissive policies toward a given pesticide) is not a cost to be considered in the EPA economic analysis.

Although it is essential that the Administrator of EPA appreciate the economic implications of EPA's proposed regulatory actions, the primary mission of EPA is environmental protection. To borrow a phrase from President Nixon's message on Reorganization Plan No. 3,²¹⁷ that mission must necessarily affect its view of economic questions.

FIFRA Section 2(bb) requires the EPA Administrator in defining "unreasonable adverse effects on the environment" to take into account the economic, social, and environmental costs and benefits of the use of any pesticide.²¹⁸ The 1975 amendments to FIFRA, Public Law 94-140, require the Administrator to include among the factors he takes into account, in determining whether to cancel or to change a classification, the "... impact of such final action on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy. . . ." ²¹⁹

The registration, reregistration, and classification regulations of EPA have transformed the statutory mandate, that the Administrator "take into account" certain factors, into a rigid risk/benefit balancing act. The EPA regulations require a finding that benefits outweigh risks or risks outweigh benefits before a decision to register, not register, or cancel may be made. This requirement artificially constrains the discretion and subverts the judgment of the Administrator. It allows the Administrator, vested by law with the duty to make difficult qualitative judgments and policy choices, to defer his most difficult decisions to the imperfect technique of risk/benefit analysis.

Admittedly, there is authority in the legislative history of FIFRA that clearly suggests that risk/benefit balancing is appropriate.²²⁰ Nonetheless, the statute gives the Administrator ample opportunity to fashion a regulatory approach that will retain its vitality as circumstances change and EPA's understanding of the scientific issues increases. As this discussion shows, circumstances have changed.

By May 14, 1976, 889 of the 1,505 active ingredients in the 35,000 registered pesticide compounds had been reviewed to determine

²¹⁵ *National Cancer Institute, Cancer Rates and Risks* 3 (2d ed. 1974).

²¹⁶ Hearings on Departments of Labor and Health, Education, and Welfare Appropriations for 1977 Before a Subcommittee of the House Committee on Appropriations, 94th Cong., 2d sess., pt. 4 at 147 (1976).

²¹⁷ See text accompanying note 7 *supra*.

²¹⁸ 7 U.S.C. § 136(bb) (1976).

²¹⁹ 7 U.S.C. § 136d(b) (1976).

²²⁰ *E.g.*, H. Rep. No. 94-497, 94th Cong., 1st sess. 6 (1975).

whether sufficient data were in EPA files to permit determinations of their safety.²²¹ Only 419 of the 889 active ingredients reviewed had sufficient data on file to make a determination²²² and, of those 419 ingredients, 238 met or exceeded the risk criteria.²²³ More than 80% of those 238 active ingredients meeting or exceeding the risk criteria are suspect carcinogens.²²⁴ Moreover, by number of registered products and by production volume, *the 238 suspect active ingredients represent approximately one-third of all pesticides currently on the market.*²²⁵ If beyond preliminary screening the suspect pesticides prove ultimately to warrant cancellation, EPA will be torn by a trying choice. Can the United States afford to remove a significant percentage of all pesticides from the market? Can it afford not to? The Agency's actions to date suggest that it has not as yet squarely faced this problem.

On May 27, 1976, EPA published in the *Federal Register* a notice entitled "General Statement of Policy—Data Requirements for Registration."²²⁶ Whether the notice comports with the mandate and intent of the statute requires close consideration.

EPA is by law required to reregister 35,000 pesticides by October 21, 1977.²²⁷ It may only register or reregister a pesticide if it finds that the pesticide will not cause unreasonable adverse effects on man or the environment.²²⁸ The applicant for new registration or reregistration has the burden of proof on this issue.

The May 27, 1976, notice creates a new category of registration: conditional registration. All pesticides for which needed data are missing (*e.g.*, data regarding the pesticide's tumor causing properties) will be conditionally registered so that laboratory testing may be commissioned and performed.²²⁹ This plan allows pesticides to be sold without the Administrator first determining that they will not cause unreasonable adverse effects on man or the environment.

Moreover, a conditional registration may be terminated *only* by proceedings to cancel.²³⁰ If no data are submitted, the conditional registration may be terminated by cancellation alone. So too, an unconditional registration may be terminated only by proceedings to

²²¹ See note 160 *supra*.

²²² *Id.*

²²³ Letter from Edwin L. Johnson, Deputy Assistant Administrator, Office of Pesticide Programs, EPA, to Honorable John E. Moss, Chairman, Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce, May 14, 1976.

²²⁴ RPAR [Rebuttable Presumption Against Registration] Chemical Fact Sheet and Schedule for each pesticide that is a candidate for rebuttable presumption against registration, Office of Special Pesticide Review, Office of Pesticide Programs, EPA, Apr. 30, 1976.

²²⁵ Compare *id.* with note 223 *supra*.

²²⁶ 41 Fed. Reg. 21685 (1976).

²²⁷ Compare 7 U.S.C. § 136a(c)(2) (1976), Public Law 94-516, § 4, as amended by Public Law 94-140, § 4, with note 159 *supra*.

²²⁸ 7 U.S.C. § 136a(c)(5) (1976).

²²⁹ 41 Fed. Reg. 21685, 21687 (1976). Oncogenicity tests and chronic feeding tests will be allowed 36 months for submission. Foliar residue and exposure tests will be allowed 48 months for submission. But, failure to submit requisite test results within the allowed time will not result in termination of the conditional registration. Conditional registration will be terminated *only* by proceedings to cancel or suspend. (See text accompanying note 216 *infra*.) Of the 889 active ingredients reviewed to determine whether sufficient data were in EPA files to make safety determinations (see note 221 *supra* and accompanying text), 470 active ingredients lacked critical data. These 470 active ingredients plus whatever part of the 616 active ingredients yet to be initially reviewed will be registered if they meet the requirements of the conditional registration scheme. This process renders meaningless the Oct. 21, 1977, deadline. The schedule whereby testing initiation will be ordered will itself scarcely be completed, if at all, by the Oct. 21, 1977, deadline. (See note 160 *supra*.)

²³⁰ 41 Fed. Reg. 21685, 21688 (1976).

cancel. In effect, then, no distinction exists between conditional and unconditional registration. Moreover, EPA promises to initiate proceedings to suspend or cancel a conditionally registered pesticide on the basis of submitted data only, "... if submitted *data establishes that the pesticide may generally cause unreasonable adverse effects on man or the environment.* . . ." ²³¹ That language directly contravenes the statutory mandate. ²³² EPA unilaterally has shifted to itself the burden of proof on the unreasonable adverse effects issue. In this way section 3 of FIFRA, as amended, requiring pre-registration review of all pesticides for unreasonable adverse effects, ²³³ is evaded by the terms of the May 27, 1976, notice.

Cancellation hearings are formal adjudicatory procedures, which are time consuming and costly. The DDT administrative hearing lasted 7 months; 125 witnesses appeared to testify; 365 exhibits were placed in evidence; ²³⁴ and the transcript was longer than 9,000 pages. ²³⁵ At the time of the Aldrin-Dieldrin suspension, the transcript of the cancellation hearing had exceeded 24,000 pages, not including thousands of pages of witnesses' statements. ²³⁶ This generous grant of additional procedural rights by EPA's conditional registration scheme benefits only the manufacturers and formulators of pesticides, not the public. Pesticides, unless known certainly to be safe or hazardous, will be presumed safe until proven otherwise. Whether this is sound policy for the agency whose primary mission is protection of the public against environmental stress might appear arguable; but in view of recent EPA and GAO findings with respect to the quality of data submitted to EPA by registration applicants, this policy is wrong and subjects the public to unnecessary and significant health risks.

On January 20, 1976, Deputy Administrator John R. Quarles, Jr., testified before a Joint Hearing of the Senate Subcommittee on Administrative Practice and Procedure of the Judiciary Committee and the Senate Subcommittee on Health of the Labor and Public Welfare Committee regarding pesticide safety testing. He indicated that one of the four following improper situations are possible: ²³⁷

[f]irst, a laboratory could be technically incompetent to perform the test, due to an inadequacy of personnel, essential equipment or management experience. Second, valid test results indicating dangerous pesticide characteristics may be withheld from EPA. Third, a laboratory might be so dependent upon a pesticide producer for contract work that its independent scientific judgment could be impaired by the close economic relationship. And fourth, a laboratory might intentionally misrepresent test results at the request of the manufacturer.

He went on to state that although EPA believes that private laboratories "... generally provide competent and honest services, there are indications that serious problems may exist." ²³⁸ On April 9, 1976,

²³¹ *Id.*

²³² 7 U.S.C. § 136a(c)(5) (1976).

²³³ *Id.*

²³⁴ *EPA v. EPA*, 6 E.R.C. 1115 n.24 489, F.2d 1247, 1251 n.24 (1973).

²³⁵ *Id.*

²³⁶ Opinion of the Administrator (EPA) on the Suspension of Aldrin-Dieldrin, 39 Fed. Reg. 37265 n.2 (1974).

²³⁷ Hearings on Preclinical and Clinical Testing by the Pharmaceutical Industry 1975 Before the Senate Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm. and the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d sess. (1976).

²³⁸ *Id.*

Administrator Train reiterated EPA's serious doubts as to the quality and reliability of data submitted by private laboratories.²³⁹ On January 26, 1976, the GAO submitted a letter report regarding EPA's program to review the quality of data submitted on safety and efficacy. That report identified several deficiencies in EPA's review. Nonetheless, EPA has developed no separate and distinct plan to ensure that the data developed for the conditionally registered pesticides will be complete, accurate, and reliable.²⁴⁰

It is imperative that EPA regulate pesticides consistently in the public interest. Private environmental groups, although they have made quite an impressive record in their efforts to protect the environment, have neither the resources nor the personnel to do the whole job, nor, indeed, do they have the legal obligation. EPA Deputy Administrator John R. Quarles, Jr., wrote:²⁴¹

[t]he simple fact is that environmentalists usually operate at a disadvantage when competing against representatives of industry. A disparity in resources seriously undermines the ability of environmental and other public interest groups to compete against their industry counterparts in four major areas: Congressional lobbying, advertising, the ability to marshal technical information, and litigation capability.

The Environmental Defense Fund (EDF), one of a handful of environmental groups specializing in litigation, played a major role in litigation involving DDT, Aldrin/Dieldrin, and Heptachlor/Chlordane. According to EDF, its 1975 budget was \$1,306,444. It spent \$1,488,781, though, thereby incurring a \$182,337 deficit. EDF has received no attorneys fees whatsoever in any of its pesticide cases. Precisely 23 persons are employed by EDF, including 9 attorneys and 6 scientists.

EDF's adversary in the DDT case was Montrose Chemical Corporation of California; in Aldrin/Dieldrin, Shell Oil Company; in Heptachlor/Chlordane, Velsicol Chemical Corporation. According to Shell Oil Company's Annual Report, 1975 sales of agricultural and other chemicals amounted to \$251,000,000.²⁴² Other major pesticide manufacturers include Monsanto Company, Ciba-Geigy Corporation, E. I. duPont de Nemours & Company, Inc., Dow Chemical Company, and Eli Lilly & Company.²⁴³ In order that environmental policy may be formed on the basis of—in EPA Deputy Administrator John Quarles' terms—superior logic and not superior resources—²⁴⁴ EPA will have to represent the environment more aggressively.

²³⁹ *Id.*

²⁴⁰ General Accounting Office, *Adequacy of Safety and Efficacy Data Provided by Non-governmental Pesticide Laboratories*, RED-76-63, January 26, 1976. For a bibliography of General Accounting Office Reports on the Environmental Protection Agency see Appendix B *infra*. The EPA Office of Special Pesticide Review subjects pesticide candidates for rebuttable presumption against registration to intensive chemical review of all data showing that the product meets or exceeds the risk criteria of section 162.11 of the Regulations, 40 CFR 162.11, 40 Fed. Reg. 28242, 28281 (1975). EPA conducts no comparable intensive review of data advanced by applicants for new or continued registration. Clearly this EPA policy more actively protects the interests of pesticide manufacturers (See text accompanying note 212 *supra*: "[t]he impacts on pesticide manufacturers are not germane to this type of regulatory decision, . . .") than it protects the public interest.

²⁴¹ John R. Quarles, Jr., Deputy Administrator, EPA, *Fighting the Corporate Lobby*, 6 ENVIRONMENTAL ACTION 3, Dec. 7, 1974. See Appendix D *infra* for the Opinion of the Comptroller General of the United States regarding public participation funding.

²⁴² Shell Oil Company 1975 Annual Report at 18.

²⁴³ See note 163 *supra* at Appendix C.

²⁴⁴ See note 241 *supra*.

3. Conclusions

(1) Approximately one-third of all pesticides currently registered meet or exceed EPA's risk criteria for acute or chronic toxicity;

(2) EPA's plan for "conditional registration" directly contravenes the Federal Insecticide, Fungicide and Rodenticide Act's mandate that pesticide products not be registered unless the Administrator first determines that they do not cause unreasonable adverse effects on man or the environment;

(3) EPA's plan for "conditional registration" directly contravenes the Act by shifting the burden of proof on the issue of a pesticide's hazard or safety from registration applicants to EPA;

(4) EPA's excessive reliance on risk/benefit analysis institutionalizes a bias against the public health and welfare;

(5) The Act's deadline for reregistration and reclassification will not be met in any meaningful manner;

(6) EPA's developing cancer policy is progressively less oriented to public protection.

In sum, in its regulation of pesticides, EPA is failing to perform its mandate to protect the public. EPA's developing pesticide program is increasingly solicitous of the pesticide industry at the expense of the public health and well-being. It is EPA's job to protect and enhance the quality of the environment. Its permissive regulation of pesticides threatens, instead, to degrade environmental quality. Administrator Train once said,²⁴⁵

[I]t is time we started putting chemicals to the test, not people.

It is indeed unfortunate that his sentiment has not found expression in EPA's pesticides program.

IV. Conclusions and Recommendations

A. MOBILE SOURCE EMISSION CONTROL

The division of responsibility for mobile source emission control between the Office of Mobile Source and Noise Enforcement and the Office of Mobile Source Air Pollution Control should be eliminated for it has generated a rivalry which has resulted in excessive delays in EPA's programs to protect and enhance the quality of the ambient atmosphere. It has caused EPA to waste resources and public funds on efforts to remedy the damage caused by individuals seeking to protect their administrative territory. In the dispute over the selective enforcement auditing regulations, the rivalry necessitated personal efforts by Administrator Train to refute criticism of selective enforcement auditing by the Office of Mobile Source Air Pollution Control.

The Office of Management and Budget, once aware of that criticism, used it to support its opposition to selective enforcement auditing. Because Administrator Train could not overcome OMB's opposition, after substantial delay he approved the selective enforcement auditing regulations unilaterally.²⁴⁶

²⁴⁵ Address by Russell E. Train, Administrator, EPA, to the National Press Club, Feb. 26, 1976.

²⁴⁶ See text at pp. 121-23 *supra* for a discussion of this transaction.

The division of responsibilities within EPA is explained as an historical accident. EPA's program responsibilities must be restructured so that the Office of Mobile Source Air Pollution Control is restricted to its original technical role and the Office of Mobile Source and Noise Enforcement assumes policy responsibility for all components of the mobile source emission control and enforcement strategy.

Congress enacted, in section 207(c) of the Clean Air Act, a system whereby decisions to order vehicle recalls would be subject to public scrutiny and participation.²⁴⁷ EPA frustrated this statutory plan as it did not require the manufacturer to submit a recall plan and did not initiate the section 207(c) public hearing process in the course of reaching its decision not to base recalls on the 1972 and 1973 In-Use Compliance Program data. In connection with the 1972 In-Use Compliance Program, EPA privately shared information with manufacturers, while preventing public access to that same information. This procedure directly contravenes the intent of the statute. Until June 1976, it was EPA policy not to disclose publicly recall investigations until a recall resulted. That policy has now been changed so that the public is told of recall investigations in progress.²⁴⁸ But public disclosure is not the same as public participation; it is merely the first step. EPA should adhere fully to section 207(c) of the Clean Air Act in order that its decisionmaking may be subject to public scrutiny and open to public participation.

The recently issued selective enforcement auditing regulations should be upgraded to ensure that vehicles coming off the assembly line conform to the section 202 Clean Air Act emission standards. In order for vehicles being tested to satisfy the requirements of the selective enforcement auditing regulations, only 60% of the vehicles tested from a given configuration must conform to the Clean Air Act section 202 emission standards.²⁴⁹ As initially proposed, the regulations would have required 90% conformity.²⁵⁰ If a 90% conformity requirement would be "unreasonably burdensome" ²⁵¹ to manufacturers, then EPA should fashion an enforcement program which, while still requiring a high performance standard, is responsive to special circumstances. Such program should put the full burden on the manufacturer to come forward with a request for a variation.

The 60% compliance standard will affect the recall program and the inspection and maintenance program, EPA's assertions to the contrary notwithstanding. Since EPA found it would be "unreasonably burdensome" to manufacturers to require better than 60% assembly-line compliance, it is illogical to assume that it would impose a more stringent in-use compliance standard for purposes of recall. Moreover, the 60% compliance standard will undercut the credibility and impair

²⁴⁷ Clean Air Act section 207(c) is reproduced in the text accompanying note 85 *supra*.

²⁴⁸ See text accompanying notes 93-95 *supra* for a discussion of the circumstances leading up to EPA's change in policy.

²⁴⁹ See note 48 *supra* and accompanying text.

²⁵⁰ See notes 81 and 82 *supra* and accompanying text.

²⁵¹ EPA decided to set a 60 percent conformity requirement "[i]n order to implement SEA in a manner not unreasonably burdensome to the auto companies." This despite EPA's express declaration that it would have the legal authority to set a 90 percent conformity requirement. 41 Fed. Reg. 31472, 31474 (1976). (See note 83 *supra* and accompanying text.)

the likelihood of continued effectiveness or success of any inspection and maintenance program that would purport to make vehicle owners responsible for poor emission performance of their vehicles. Since owners can be asked justifiably to bear the cost of repair only of vehicles which EPA can verify conform when new to emission standards, a program not designed to verify at the assembly line conformance will jeopardize inspection and maintenance program efforts that follow. The 90% conformity requirement of the proposed selective enforcement auditing regulations, therefore, should be reinstated.

The recall program should be redesigned to ensure that vehicles if properly maintained will meet Section 202 Clean Air Act emission standards throughout their useful life. EPA does not presently plan to implement a recall surveillance program that can be termed comprehensive.²⁵² Instead, EPA plans to identify nonconforming vehicles for possible recall by using a variety of loosely-related surveillance techniques and by monitoring disparate sources of information about defects.²⁵³ But those techniques are not a satisfactory substitute for a method of systematic sampling of all vehicle configurations and testing of representative numbers of vehicles. The abandoned in-use compliance program, or a similarly comprehensive program, could provide a firm recall surveillance base for later inspection and maintenance efforts.

By this means, EPA would be able to verify that vehicles, if properly maintained, conform *when in actual use* to the emission standard; otherwise, the owner cannot be asked justifiably to bear the cost of repair. EPA attributed the failure of the in-use compliance program to its execution.²⁵⁴ The Subcommittee believes that in concept it was sound.²⁵⁵ Furthermore, since a comprehensive recall surveillance program is conceptually indispensable to a systematic mobile-source emission control strategy, efforts to reinstate surveillance should be commenced promptly.

EPA has declared—and the Subcommittee agrees—that inspection and maintenance is “[t]he single most important incremental component of a comprehensive [mobile source emission control] strategy.”²⁵⁶ The shape inspection and maintenance programs will ultimately take depends on the outcome of the United States Supreme Court’s review of the four circuit courts of appeals cases.²⁵⁷ Whatever the Court decides, EPA must find means to establish a comprehensive and effective inspection and maintenance program or promptly seek new legislation from Congress.

The Agency should supplement its enforcement techniques with efforts to encourage voluntary vehicle maintenance, such as advertising the fuel savings that may be achieved.²⁵⁸

²⁵² See note 118 *supra*.

²⁵³ *Id.*

²⁵⁴ See text accompanying note 103 *supra*.

²⁵⁵ The more than \$4,000,000 in contract funds and additional EPA resources spent on the in-use compliance program was considered expensive only because it failed. Had the in-use compliance program succeeded, the cost would have been considered reasonable for a program designed to test a sample of vehicles representing three-fourths of the vehicle population. Cf. *Hearings* note 6, at 6.

²⁵⁶ See note 65 *supra*.

²⁵⁷ See text pp. 131–32 *supra*.

²⁵⁸ See letter from Administrator Russell E. Train to OMB Director Lynn, Sept. 16, 1975. *Hearings supra* note 6, at 125.

B. OFFICE OF MANAGEMENT AND BUDGET

The Office of Management and Budget acts as a "super-legislative body"²⁵⁹ in its review of the EPA budget and in its management of interagency review of EPA regulations. It significantly delayed final promulgation of the selective enforcement auditing regulations despite repeated assurances from Administrator Train that selective enforcement auditing²⁶⁰

"... was needed and that it represent[ed] the most cost effective and least burdensome approach to assuring emissions compliance of new production vehicles. . . ."

OMB disallowed grant funds to support inspection and maintenance and sought to eliminate EPA's inspection and maintenance program altogether despite the Agency's determination that inspection and maintenance should be elevated to the "... #1 priority strategy within the Agency, in the eyes of Congress, and in the minds of the people for achieving reductions in mobile source pollutants."²⁶¹ The Office of Management and Budget's prolonged 146 day review of the final selective enforcement auditing regulations constituted an attempt to pre-empt the authority vested in the EPA Administrator by the Congress.²⁶² Its opposition to inspection and maintenance forced EPA to redesign its mobile source emission control strategy.

Congress must closely monitor the Office of Management and Budget's efforts to influence EPA decisions in order to ensure that the authority vested in the EPA Administrator is exercised by the EPA Administrator, in fact, and not by the Executive Office of the President through its Office of Management and Budget. New legislation may be necessary if OMB continues its extra-legal role in Environmental Protection Agency policy decisions.

C. PESTICIDES

EPA should faithfully adhere to the mandates of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

(1) Section 3(c)(5) of the Act prohibits the EPA Administrator from registering a pesticide unless he first determines that it does not cause unreasonable adverse effects on man or on the environment.²⁶³ EPA's conditional registration scheme allows the Administrator to register first and ask questions later.²⁶⁴ The conditional registration scheme should be changed to conform with the statutory mandate.

(2) Section 3(c)(5) of the Act puts the burden of proof on the issue of a pesticide's safety or hazard on the applicant for registration. EPA's conditional registration scheme shifts the burden of proof to EPA.²⁶⁵ The conditional registration scheme should be changed to conform with the statutory mandate.

²⁵⁹ See note 59 *supra* and accompanying text.

²⁶⁰ See text accompanying note 73 *supra*.

²⁶¹ See note 152 *supra*.

²⁶² See text pp. 121-23 *supra* for a discussion of the Office of Management and Budget's review of the selective enforcement auditing regulations.

²⁶³ See note 170 *supra*.

²⁶⁴ See note 229 *supra* and accompanying text.

²⁶⁵ See text accompanying notes 230-32 *supra*.

(3) The Act requires the Administrator by October 21, 1977, to re-register and reclassify the more than 35,000 pesticide products that were registered according to the terms of FIFRA in force prior to implementation of the 1972 amendments.²⁶⁶ EPA's conditional registration scheme, contrary to the express provisions of the statute, extends the October 21, 1977, deadline for, in most cases, a minimum of three years.²⁶⁷ The terms of conditional registration render meaningless the October 21, 1977, deadline. If the statutory deadline is impossible or impracticable to comply with, EPA should openly acknowledge that to Congress and explain the cause of the delay. Congress, then, would have an opportunity to fashion an appropriate legislative response.

(4) Risk/benefit analysis should not be used as a substitute for the exercise of substantive, qualitative judgment in pesticide regulatory decisionmaking. The usefulness of risk/benefit analysis in the context of pesticide regulation is too limited for regulatory purposes. The decisionmaker's judgment after consideration of all relevant factors—"informed but nonetheless inadequate"²⁶⁸ though that judgment may be—must shape decisions to change a use classification or to deny or cancel a registration. The public cannot be adequately protected by decisions based on risk/benefit analysis alone, an imperfect, inherently biased²⁶⁹ decisionmaking method.

(5) EPA should develop a plan to ensure that safety data now lacking for pesticides will be produced in complete, accurate, and reliable form. Moreover, it should develop a comprehensive plan to ensure that all safety data submitted to support registration of pesticides are complete, accurate, and reliable.

Chairman Moss observed in his opening statement on the occasion of the Subcommittee's first day of hearings on the Agency:²⁷⁰

In recent months, a number of EPA decisions betray a degree of restraint seemingly uncharacteristic of an agency fully committed to an aggressive pursuit of its statutory mandate to protect the public health.

EPA's regulation of pesticides demonstrates the accuracy of this observation.

D. GENERAL

"Questions involving the environment are particularly prone to uncertainty. Technological man has altered his world in ways never before experienced or anticipated. The health effects of such alterations are often unknown, sometimes unknowable. While a concerned Congress has passed legislation providing for protection of the public health against gross environmental modifications, the regulators entrusted with the enforcement of such laws have not thereby been endowed with a prescience that removes all doubt from their decisionmaking."²⁷¹

²⁶⁶ See note 227 *supra*.

²⁶⁷ See note 229 *supra*.

²⁶⁸ "There is a point in the regulatory decision-making process at which the present state of our science is exhausted, and informed but nonetheless inadequate judgment must take over." Remarks by Russell W. Peterson, Chairman, Council on Environmental Quality, Society of Toxicology Annual Meeting (Mar. 16, 1976).

²⁶⁹ See text accompanying note 210 *supra*.

²⁷⁰ Hearings, *supra* note 6, at 2.

²⁷¹ *Ethyl Corp. et al. v. EPA*, — F.2d — (D.C. Cir. Mar. 19, 1976); cert. denied, — U.S. —, 96 S. Ct. 2663 (June 14, 1976).

The Subcommittee appreciates the difficulty of the Environmental Protection Agency's mission. The Agency's first task, when created in 1970 by consolidating 15 program components from five departments and agencies, was to make itself into an effective regulatory agency. After only one year of operation EPA employed nearly 6,000 people and had budget authority approaching \$300 million. During the early 1970's, an unprecedented quantity of far-reaching environmental quality legislation was enacted. This legislation imposed demanding responsibilities on the newly formed Agency.

EPA is the largest of the nine agencies covered in this report. Its budget authority is larger than the sum of the other eight.²⁷² EPA's pesticide program alone employs more people and has a larger budget than the entire Consumer Product Safety Commission.²⁷³

The scope of the Subcommittee's study did not encompass all of EPA's diverse programs. Conclusions reached regarding EPA's regulation of pesticides, for example, are not necessarily relevant to its regulation of other toxic chemicals. EPA derives its authority to regulate pesticides from the Federal Insecticide, Fungicide, and Rodenticide Act. That Act does not authorize EPA to regulate other toxic chemicals; nor would the Office of Pesticide Programs be responsible for their regulation. Similarly, conclusions reached regarding EPA's regulation of pollutants in a given medium, e.g., air, or from a given source, e.g., motor vehicles, may not apply to its regulation of pollutants in different media, e.g., water, or from different sources, e.g., atomic power generating plants.

Nonetheless, the Subcommittee's study of the Environmental Protection Agency did enable it to perceive the general characteristics of the Agency and did serve to identify certain obstacles to the protection and enhancement of environmental quality.

Foremost among those obstacles is EPA's attitude toward its statutory responsibilities. Often it has been too timid. EPA is the only regulatory agency whose primary mission is the protection and enhancement of environmental quality. The largest agency studied by the Subcommittee, it is still quite small compared with the industrial complex it regulates. For example, Shell Oil Company's 1975 sales of agricultural and other chemicals, alone, amounted to more than one-fourth of EPA's 1975 budget. Certainly EPA must consider carefully the economic impact of its actions and must act responsibly. At the same time, it must be aggressive in its efforts to fulfill its primary responsibility to spare the American people unnecessary environmental injury.

EPA's record in the face of intense opposition has been mixed. While Administrator Train did unilaterally approve the selective enforcement auditing regulations, the emission performance standard finally promulgated will but minimally affect motor vehicle pollutant emissions.

The range and strength of EPA's opposition suggests the need not only for EPA to pursue its mission more aggressively, but also for

²⁷² See note 9 *supra* and accompanying text.

²⁷³ Compare EPA, *The Environmental Protection Agency: Legislation, Programs and Organization* 54 (1975) with text accompanying note 100 of Chapter 6.

Congress to provide additional means by which EPA's activities and opposition can be monitored. Administrator Train recently stated:²⁷⁴

The fact is that everything we do is controversial, almost everything we do means increased cost to somebody. Typically, whenever we take an action here, there are those who say we haven't moved fast enough and there are those who say we've moved too fast. And that is true on the same regulation, on the same day, and very often we get sued by both sides—which gives you, I think, an indication of the fact that we're the guys in the middle.

Congressional oversight of EPA should be augmented by efforts of a new Agency for Consumer Protection empowered to participate on behalf of the public in agency proceedings. Moreover, mechanisms should be established by which private environmental advocates could achieve funding sufficient to support broader participation in agency proceedings. Specific recommendations suggesting techniques to accomplish the foregoing goals are set out in chapter 17.

Finally, EPA should adhere more closely to its statutory mandates. By so doing, it can expect support from the Congress against the criticism it receives and so bring into the public arena debate over the merits of its programs. If Congress imposes deadlines that are incapable of attainment, then EPA should inform the Congress and the public. It should not endeavor to mask its failure to meet deadlines by formulating programs that satisfy the letter of the law but that show contempt for its spirit.

In conclusion, the Subcommittee believes that EPA has begun in good faith its efforts to fulfill its major public responsibility. It should be commended for the sensitivity it has shown to economic issues. But it must increase its responsiveness to the human and environmental consequences of its policies and decisions. With increasing frequency, the profits one man earns through permissive regulation of pollution caused by his enterprise produce losses to the next man's property and health. It is EPA's job to decide when short-term profits must give way to efforts to protect and enhance long-term environmental quality.

Albert Schweitzer once said:²⁷⁵

Man has lost the capacity to foresee and to forestall. He will end by destroying the earth.

Such fate the Environmental Protection Agency must help avoid.

²⁷⁴ CBS Reports, *The Politics of Cancer*, June 22, 1976.

²⁷⁵ RACHEL CARSON, *SILENT SPRING* V (1962).

FEDERAL REGULATION AND REGULATORY REFORM

PART II

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

CONSUMER PRODUCT SAFETY COMMISSION

FEDERAL COMMUNICATIONS COMMISSION

FOOD AND DRUG ADMINISTRATION

FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 5

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

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CHAPTER 5

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

I. Summary

NHTSA's program of Federal motor vehicle safety standards began vigorously after Congress passed the National Traffic and Motor Vehicle Safety Act of 1966. Before the end of 1970, more than 30 standards had been issued. The crashworthiness standards that were issued from 1967-1970 alone have saved more than 28,000 lives. Their benefits exceeded their costs, according to a GAO study. Since 1970, the pace of issuing new standards has slackened. Little if any further improvement in vehicle crashworthiness appears in the 1971-1973 models.

Since 1969, NHTSA has committed a major portion of its resources to developing a rule on passive restraints, but has been unable to overcome opposition to the proposed standard from the auto makers, the White House, and the Council on Wage and Price Stability.

Recently the Secretary of Transportation assumed full responsibility for reaching a final decision on passive restraints. At that level, political factors are expected to vie with statutory criteria for safety standards.

Much of the political opposition to this rule and to other important NHTSA actions has come in the form of benefit/cost analyses that are critical of NHTSA actions and in the form of demands that NHTSA itself conduct more extensive benefit/cost studies. This is despite the fallacies inherent in such analysis where, as here, there is little if any acceptable data. Substantial harm to NHTSA rulemaking has resulted from insistence by the Council on Wage and Price Stability upon benefit/cost analysis of safety standards. The legislative history of the 1966 Vehicle Safety Act indicates that Congress did not intend that benefit/cost analysis be a prerequisite to the issuance of motor vehicle safety standards.

NHTSA's independence from political interference in Congressionally mandated safety regulation would be enhanced by removing its regulatory functions from the Department of Transportation and combining them with the programs of the Consumer Product Safety Commission and the Food and Drug Administration in a new Consumer Safety and Health Commission.

The Subcommittee further recommends that the Council on Wage and Price Stability and others suspend their demands for benefit/cost analysis of NHTSA rules until a data base is developed to make it possible to perform reasonable benefit/cost analyses, and recommends in addition that the appropriate committees of Congress ensure that no office of council interfere with the statutorily assigned duties of NHTSA or any other regulatory agency unless authorized by statute.

II. Mandate and Implementation

In September 1966, Congress passed a pair of companion acts, the National Traffic and Motor Vehicle Safety Act of 1966 (P.L. 89-563, hereafter "Vehicle Safety Act") and the Highway Safety Act of 1966 (P.L. 89-564).¹ The intent of Congress in establishing these safety programs under the National Highway Traffic Safety Administration (NHTSA) was to reduce traffic accidents and associated deaths and injuries. In the language of the Senate Report on the Vehicle Safety Act:²

... the compelling need for the strong automobile safety legislation which the Commerce Committee is today reporting lies embodied in those statistics: 1.6 million dead since the coming of the automobile; over 50,000 to die this year. And, unless the accelerating spiral of death is arrested, 100,000 Americans will die as a result of their cars in 1975.

Under this Act, for the first time, the automakers were identified as sharing responsibility with drivers, traffic officials, road designers and road builders for the highway death toll.³

... the committee met with disturbing evidence of the automobile industry's chronic subordination of safe design to promotional styling, and of an overriding stress on power, acceleration, speed, and "ride" to the relative neglect of safe performance or collision protection.

Congress concluded that the *Federal government* could and should play an important role in vehicle safety:⁴

This legislation also reflects the committee's judgment that the Federal Government has a major responsibility to meet in assuring safer performance of private passenger cars which it has not yet met. Finally, this legislation reflects the faith that the restrained and responsible exercise of Federal authority can channel the creative energies and vast technology of the automobile industry into a vigorous and competitive effort to improve the safety of vehicles.

A. THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT OF 1966

Congress intended the Vehicle Safety Act to provide, in the language of the House Report, a "coordinated national safety program and establishment of safety standards for motor vehicles."⁵ The Congress accepted the determination of the House Committee on Interstate and Foreign Commerce in 1966 that a "*present necessity* to establish Federal motor vehicle safety standards existed."⁶ Under the bill initially introduced, the Secretary of Commerce⁷ could not have established standards without first making a determination as to their necessity.

¹ 15 U.S.C. 1381 *et seq.*, and 23 U.S.C. 401 *et seq.*

² Senate Report No. 1301, 89th Cong., 2d Sess., pp. 1-2 (1966). The actual toll of fatalities in 1975 was approximately 45,000.

³ *Id.* at p. 2.

⁴ *Id.* at p. 1.

⁵ H. Rep. No. 1776, 89th Cong., 2d Sess., p. 1 [hereafter "House Report"].

⁶ *Id.* at p. 15 (emphasis added).

⁷ The Act initially established the "National Traffic Safety Agency" within the Department of Commerce. The Department of Transportation Act of 1966 (P.L. 89-670) transferred the Agency to the new Department of Transportation, as the National Highway Safety Bureau, within the Federal Highway Administration (49 U.S.C. 1652(f)(1)). In 1971, the Bureau was removed from the Federal Highway Administration and established as the National Highway Traffic Safety Administration within the Department of Transportation.

1. Federal motor vehicle safety standards and the rulemaking process

Section 103(a) of the Vehicle Safety Act requires the Secretary to issue safety standards for passenger cars and other types of vehicles. The statute requires that each standard "shall be practicable," shall meet the need for motor vehicle safety, and shall be stated in objective terms."⁸

The Congress declared "motor vehicle safety" to be the "paramount purpose" of the bill.¹⁰ The safety standards (fifty have been issued since 1966) are directed at motor vehicles, tires, child restraints and other types of equipment, requiring, for example, shatterproof windshields, safety belts, and collapsible steering columns. NHTSA has also promulgated a dozen regulations not directed at the vehicle itself but requiring vehicle manufacturers to take on related activities, for example, defect reporting and meeting test dummy specifications.

NHTSA develops Federal motor vehicle safety standards by an informal rulemaking process. When rulemaking actions stir wide interest (e.g. passive restraints or truck brakes) public meetings are scheduled following a notice and announcement of procedures for expressing comments. Citizens may petition NHTSA for new standards and for amendments to existing standards; NHTSA must respond within 120 days.¹¹ Yet the vast majority of the written comments are submitted by regulated industry.¹² The process is open and often lively. NHTSA's docket room, where all comments on pending rulemaking are filed, sees heavy traffic, but the docket excludes some internal memoranda, such as certain messages from other offices in the Department of Transportation and communications with other executive offices.¹³ The process is open but not wide open.

2. Enforcement of the standards: Compliance testing

To enforce the standards and regulations, NHTSA runs a compliance testing program and imposes civil penalties where appropriate.¹⁴ Through May 21, 1976, penalties totaling \$1,142,400 have been assessed, based on 175 investigations.¹⁵ Through July 1, 1975, NHTSA

⁸ House Report, p. 16. [For further discussion of this question, see III B. *infra*.]

⁹ The House Report explains the phrase "objective terms" in the following manner:

"In order to insure that the question of whether there is compliance with the standard can be answered by objective measurement and without recourse to any subjective determination, every standard must be stated in objective terms." (p. 16.)

¹⁰ *Id.*

¹¹ The 120-day response is required by the Motor Vehicle and Schoolbus Safety Amendments Act of 1974 (P.L. 93-492, Sec. 106; 15 U.S.C. 1410(d)).

¹² Despite industry's apparent upper hand in the informal rulemaking process, one trade association nonetheless preferred a formal rulemaking system, and brought suit to require it in 1968, early in NHTSA's history. The court upheld NHTSA's use of informal rulemaking, conducted according to the Administrative Procedure Act. The court stated: "[W]e have found that formal rulemaking is not required by the Safety Act." *Automotive Parts and Accessories Assn., Inc., v. Boyd* 407 F. 2d 330 (D.C. Cir. 1968).

¹³ For further discussion on this point see *infra*, note 122-3 and associated text. NHTSA asserts that such memoranda are exempt from disclosure under the Freedom of Information Act. On one occasion, DOT claimed executive privilege to prevent disclosure of alleged White House communications. See *Nader v. Folpe*, 466 F. 2d, 261 (D.C. Cir. 1972.)

¹⁴ NHTSA's authorities to test vehicles for compliance and to assess penalties derive from Section 112(a) and Section 108-109 of the Vehicle Safety Act respectively. Section 114 of the Act provides, in addition, that manufacturers must certify that each vehicle or item of vehicle equipment conforms to all applicable Federal motor vehicle safety standards. 15 U.S.C. 1403.

¹⁵ These totals reflect the activities of NHTSA's Office of Standard Enforcement only. A few additional penalties have been imposed by NHTSA growing out of defect investigations for safety hazards not covered by existing standards. Most of these investigations seek recalls rather than penalties. However, four of these investigations have led to penalties totalling \$294,520 as of July 2, 1976.

had pressed only six compliance investigations to litigation. The remaining penalties were fixed by negotiated settlements.¹⁶ Many enforcement investigations are directed against small companies for minor violations. Although NHTSA's enforcement of vehicle safety standards has not generated wide public attention, its mere presence encourages manufacturers to take safety standards seriously.

3. Defects and recalls

The Vehicle Safety Act and its amendments¹⁷ empower NHTSA to order manufacturers to recall defective vehicles. NHTSA's investigations have been instrumental in bringing about recalls for suspected safety defects of more than 49 million vehicles, about 45 percent of domestic and foreign vehicles produced for sale in the United States since NHTSA was established on September 9, 1966.

While these totals are impressive, NHTSA's Office of Defects Investigation (ODI), which orders recall, has gone into low gear. The list of "current investigations" contains open cases dating back to 1969 and 1970.¹⁸ Recently closed investigations have taken almost three times as long to complete (28.7 months) as cases closed in 1971 and 1972 (10 months).

NHTSA SAFETY DEFECT INVESTIGATIONS¹⁹

Period	Number completed investigations	Average pendency (months)
November 1967 to May 1969.....	111	3.2
June 1969 to December 1970.....	72	5.8
January 1971 to September 1972.....	100	10.0
October 1972 to April 1974.....	38	19.8
May 1974 to November 1975.....	27	28.7

¹⁹ Chart from statement of Clarence Ditlow III, Director, Center for Auto Safety before the Senate Commerce Committee, June 29, 1976.

NHTSA closes some investigations with a finding of no safety defect even in the face of substantial evidence of a serious hazard.²⁰

In a few cases, manufacturers have overturned NHTSA findings in court. One court accepted General Motors' argument that sudden and total loss of steering without warning in 1959 and 1960 Cadillacs is not related to safety because the failures occur at low speeds, and therefore do not present an unreasonable risk.²¹

The recall program has served significantly to clear the road of hazardous vehicles. It can encourage the manufacturers to exercise

¹⁶ Examples of large settlements include one of \$95,000 against Ford in 1975 (alleged violation of Seat Belt Standard) and another of \$80,000 against Uniroyal in 1973 (alleged violation of Tire Standard).

¹⁷ Under the Vehicle Safety Act, NHTSA could only order manufacturers to notify the owners of affected vehicles that their cars might contain a safety defect. In most cases, the manufacturers also offered to pay for necessary corrections. However, in some instances, they refused to pay. In response, Congress passed P.L. 93-492, signed into law in 1974, which empowers NHTSA to order the manufacturers to pay for correcting safety defects in vehicles 8 years old or less.

¹⁸ A listing of NHTSA's 20 oldest defect proceedings is included in *Hearings before the Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 94th Cong., 2d Sess. Regulatory Reform, 1976* Vol. IV, p. 479. (Hereafter, *Hearings*.)

²⁰ An example is the investigation of failures in the lower control arms of full-size 1965-1969 Ford vehicles, which lasted 6 years. Despite numerous reported failures, NHTSA found no defect. A possible factor in the finding was the high cost of replacing lower control arms and the large number of vehicles affected.

²¹ *U.S. v. General Motors*, 65 F.R.D. 115 (D.C. Cir. 1974).

care in designing and producing cars and trucks. NHTSA should pursue defect investigations with vigor.

Two reforms have been directed at the NHTSA program of investigating auto hazards. Public lists of current investigations, begun in 1972, have elicited voluntary information on specific defects. Also the Motor Vehicle and Schoolbus Safety Act of 1974 encourages citizens to petition NHTSA to open new investigations.²² Although the effect of these reforms is difficult to calibrate, they certainly alert citizens to their opportunity and duty to participate in a program dedicated to safety on the road.

B. OTHER MOTOR VEHICLE AUTHORITIES

Congress added several components to NHTSA's authority in 1972 with P.L. 92-513,²³ the Motor Vehicle Information and Cost Savings Act. The new legislation granted NHTSA the power to:

- (1) Issue a bumper standard to reduce economic loss from crashes and increase safety;
- (2) develop information on comparative insurance costs and crash safety for display in auto showrooms;
- (3) fund diagnostic inspection demonstrations through grants to States; and
- (4) take action against the practice of misrepresenting the distance traveled by a used car.

In October 1974, Congress passed another major amendment to the 1966 Motor Vehicle Safety Act: the Motor Vehicle and Schoolbus Safety Amendments of 1974 (P.L. 93-492).²⁴ The act empowers NHTSA to require vehicle recalls²⁵ and to order manufacturers who oppose an NHTSA action on the ground of increased cost to produce cost information to support their claim. It also requires the agency to grant or deny petitions from the public within 120 days, and to issue schoolbus and fuel system standards. The Act also terminated NHTSA's ignition interlock standard. The "ignition interlock" made it impossible to start a car until persons in the front seats fastened their seat belts. It was required on all 1974 models, and on 1975 models produced until the Act was signed into law. Finally, the Act provided a 60-day period for Congress to veto any standard requiring more than seat belt systems, such as air bags or other passive restraints.²⁶

C. HIGHWAY SAFETY ACT PROGRAMS

Under the other 1966 Act (Highway Safety Act, P.L. 89-564), NHTSA uses Federal standards and incentive grants to assist States and communities in developing safety programs aimed at vehicles in use, drivers and highways.

NHTSA has issued 19 Highway Safety Program Standards (HSPS) covering, for example, motorcycle helmet use and vehicle inspection.²⁷ An HSPS which would require States to pass manda-

²² 15, U.S.C. 1410.

²³ 15 U.S.C. 1901 *et seq.*

²⁴ 15, U.S.C. 1409 *et seq.*

²⁵ See *supra*, note 17. Before this amendment, recalls were voluntary.

²⁶ U.S.C. 1410b. See *infra*, notes 121-127 and accompanying text, for further discussion of both the ignition interlock and passive restraint episodes. "Passive restraints" are explained below. See *infra*, III A. 3.

²⁷ 23 C.F.R. Part 1204. NHTSA's Highway Safety Act Programs are under the jurisdiction of the House Committee on Public Works.

tory seat belt use laws has long been debated but never enacted. Roadway-related standards under this program are administered in part by the Federal Highway Administration (FHWA) a counterpart to NHTSA within the Department of Transportation. Congress may veto HSPS standards developed by the NHTSA or FHWA, and it recently suspended the Department's authority to withhold State highway aid funds for noncompliance with HSPS standards.²³

D. MANPOWER AND BUDGET

NHTSA has carried out its program of issuing and enforcing motor vehicle safety standards with a minimum of manpower and appropriations. In fiscal year 1976, this program was conducted by 175 professionals and cost \$37.9 million, excluding program direction, support and research. These figures have remained relatively constant since 1971 (176 professionals, 25.9 million in 1971). Manpower and appropriations for the entire agency in 1976 totaled 811 persons and \$171.8 million. (For a more detailed breakdown, see charts on the following pages.)

²³ The Federal Aid Highway Act of 1976, Public Law 94-280 enacted May 5, 1976. The Act places a one-year moratorium on the Secretary's authority to withhold safety funds from any State failing to comply with Highway Safety Program Standards. On July 1, 1977, the Department is again authorized to impose sanctions but instead of having the power to withhold 100 percent of a State's safety funding, the Secretary has the discretion to keep from 50 to 100 percent. Construction fund money, under the new law can no longer be withheld. Another provision specifically eliminates the Secretary's authority to require states to have *mandatory helmet laws* for motorcyclists. The bill also requires the Department to conduct an evaluation of the "adequacy and appropriateness" of program standards. (P.L. 94-280, Sec. 208(b)).

[From most recent NHTSA annual report]

Summary of Authorization and Appropriation Fiscal Years 1967-1976
(Millions of Dollars)

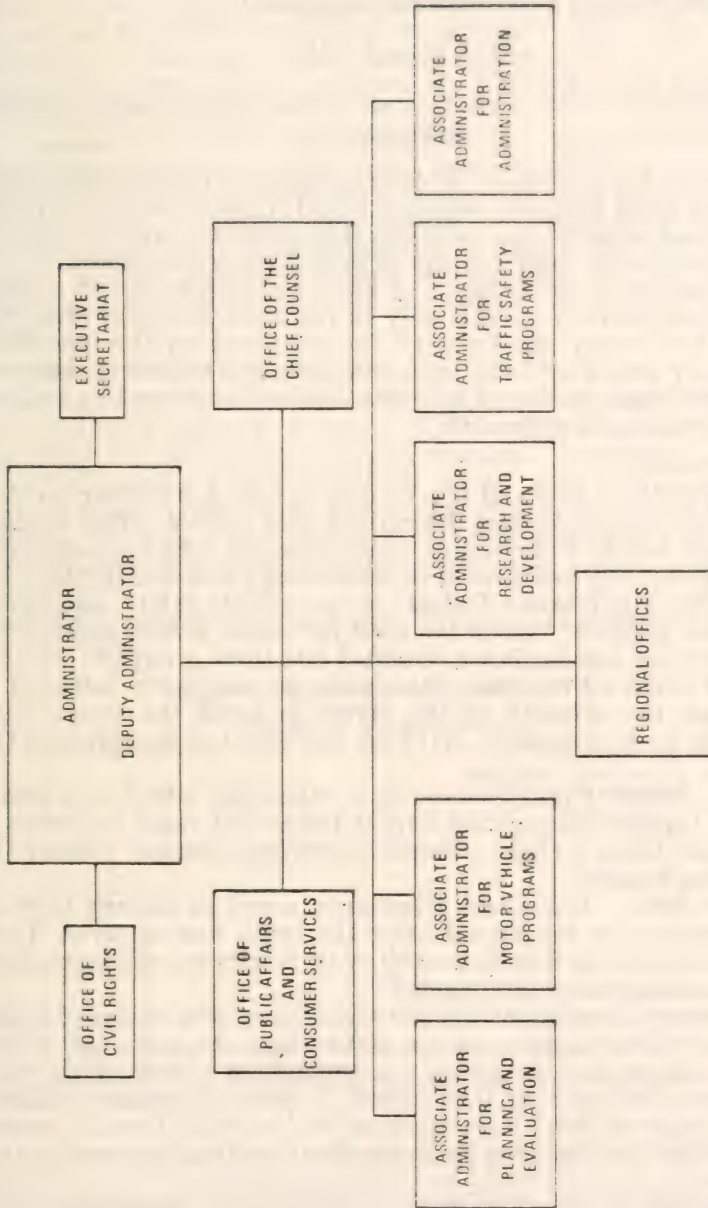
	FY 67	FY 68	FY 69	FY 70	FY 71	FY 72	FY 73	FY 74	FY 75	FY 76
Traffic and Motor Vehicle Safety Programs										
Authorization ^{1/}	13.9	18.5	24.5	23.0	40.0	40.0	36.9	30.3	55.0	60.0
Appropriation	5.0	12.5	15.0	20.2	25.9	30.7	33.0	30.3	35.1	37.9
Motor Vehicle Consumer Information Program^{2/}										
Authorization	—	—	—	—	—	—	23.0	37.0	48.0	0
Appropriation	—	—	—	—	—	—	—	18.0	7.7	0
Highway Safety Research and Development Programs										
Authorization ^{3/}	10.0	20.0	25.0	30.0	37.5	70.0	115.0	42.5	55.0	65.0
Appropriation	4.3	7.3	10.6	10.0	17.0	38.6	44.2	38.6	28.1	28.9
Compliance Test Facility										
Authorization ^{1/}	3.0 ^{4/}	2.3 ^{5/}	1.1 ^{5/}	0	0	9.6	0	0	0	0
Appropriation	.7	1.2	0	0	0	9.6	0	9.0 ^{6/}	0	0
Total Traffic and Highway Safety Appropriations										
Authorization	23.9	38.5	49.5	53.0	77.5	119.6	151.9	109.8	158.0	125.0
Appropriation ^{7/}	9.3	19.8	26.5	30.2	42.9	78.9	77.2	75.1	70.9	66.8
State and Community Safety Appropriation										
Authorization (Incentives)	67.0	100.0	100.0	0 ^{8/}	0 ^{8/}	75.0 ^{9/}	130.0 ^{10/}	162.5 ^{11/} (37.5)	203.0 ^{12/} (48.0)	241.5 ^{13/} (56.5)
Obligations:										
NHTSA (Incentives)	2.0	25.0	65.0	70.0	75.0	67.1	82.1	66.8 (.3)	85.3 (13.4)	105.0 (13.0)
FHWA						12.9	12.9	13.2	14.7	15.0
Total	2.0	25.0	65.0	70.0	75.0	80.0	95.0	80.0	100.0	120.0

¹ Authorized under the National Traffic and Motor Vehicle Safety Act.² Authorized under the Motor Vehicle Information and Cost Savings Act.³ Authorized under the Highway Safety Act.⁴ Lump sum authorization to remain available until expended.⁵ Remaining unappropriated balances.⁶ Funds appropriated for construction of compliance test facility withdrawn.⁷ The Traffic and Highway Safety Appropriation appropriates funds for programs of both substantive Acts, and the Motor Vehicle Consumer Information Program.⁸ Total authorization of \$175 million rescinded under the Highway Safety Act of 1970.⁹ For fiscal years 1967-1971 obligations were incurred in total for 1S Safety Standards. Currently, NHTSA has responsibility for 14-1/2 Standards, FHWA for 3-1/2 Standards.¹⁰ Includes authorization of \$30.0 million for FHWA.¹¹ Includes authorization of \$25.0 million for FHWA and \$37.5 million for incentive grants for NHTSA.¹² Includes authorization of \$30.0 million for FHWA and \$48 million for incentive grants for NHTSA.¹³ Includes authorization of \$35.0 million for FHWA and \$56.6 million for incentive grants for NHTSA.

History of NHTSA Personnel Strengths (Full-time Permanent Positions)
Fiscal Years 1968-1976

	FY-1969			FY-1969			FY-1970			FY-1971			FY-1972			FY-1973			FY-1974			FY-1975			FY-1976		
	President's Budget	Appropriated	Actual Year End	President's Budget	Appropriated	Actual Year End	President's Budget	Appropriated	Actual Year End	President's Budget	Appropriated	Actual Year End	President's Budget	Appropriated	Actual Year End	President's Budget	Appropriated	Actual Year End	President's Budget	Appropriated	Actual Year End	President's Budget	Appropriated	Actual Year End			
Program Direction & Coordination	54	35	49	50	49	46	50	67	63	88	98	81	94	88	94	83	94	80	93	89	97	97	94				
Motor Vehicle Programs	235	175	124	205	124	127	188	170	153	234	187	176	215	225	169	225	148	225	155	197	197	175					
Traffic Safety Programs	166	69	72	68	71	70	86	72	74	95	107	86	111	109	107	110	109	122	124	134	134	118					
Research and Analysis	180	135	123	165	143	142	158	131	129	183	128	118	143	183	174	195	178	149	166	150	183	162					
Staff and Administrative Support								87	83	110	106	95	124	114	107	116	119	112	124	124*	124	124*	117*				
Motor Vehicle Consumer Information																	40	36	33	21	30	30					
Sub-Total	635	414	374	488	387	385	482	527	502	710	616	556	687	725	645	746	725	633	765	667	765	696					
Regional Offices	127	32	32	33	33	33	41	62	54	133	101	76	130	116	105	119	116	114	115	117	116	115					
Grand Total	762	446	406	521	420	418	523	589	556	843	717	632	817	841	750	865	841	747	881	881	881	811					

*Includes 2 DOT Interns



National Highway Traffic Safety Administration Organizational Chart

The three case studies which follow offer a detailed exploration of factors impeding NHTSA's exercise of its statutory mandate, with respect to the safety standards program, the use of benefit/cost analysis in rulemaking, and the single most important failure to date, the delay in issuing a passive restraint standard.

III. Case Studies

A. STAGNATION IN NHTSA'S PROGRAM OF FEDERAL MOTOR VEHICLE SAFETY STANDARDS

Issuance and improvement of safety standards for new motor vehicles are the chief operative elements of NHTSA's mandate to reduce fatalities and injuries. Nevertheless, this program recently has been subject to across-the-board delays of long-promised standards.

The slowdown is an example of virtual abandonment of a major Congressional directive that is only 10 years old. Does this mean that NHTSA has accomplished enough for vehicle safety through standards already issued, as some agency actions and statements suggest? Or can additional savings of lives and dollars be achieved by reviving the safety standards program?

1. Background

The legislative history of the Vehicle Safety Act is clear on three basic points: first, Congress determined that vehicle safety is manifestly a task for the Federal government; second, vehicle safety standards are a necessity and should be mandatory; and finally, the prime criterion for a particular Federal motor vehicle safety standard is whether the proposal "*meets the need for motor vehicle safety.*"²⁹

Motor vehicle standards are classified into three groups.³⁰

100 Series: Pre-Crash Standards, or standards intended to increase the capacity of the driver to avoid the crash. These include brake standards. NHTSA has issued 26 standards in this series.

200 Series: Crash Standards, or standards intended to reduce losses through minimizing impact forces that reach occupants in a crash. These include collapsible steering columns. Twenty-two have been issued.

300 Series: Post-Crash Standards, aimed at keeping losses at a minimum in the period after the crash has occurred. These include a standard on flammability of fabrics in vehicle interiors. Two standards have been issued.³¹

The potential benefits of the 200 series have been among the least recognized.³² The objective of the 200 series is to make the vehicle protective rather than dangerous to occupants in a crash. This policy derives from the opinion that efforts to prevent crashes (the sole approach prior to 1966) have appeared to be futile. Thus, if crashes are inevitable, vehicles must be designed so that fatalities and injuries

²⁹ For a discussion of these points see *supra*, notes 4 to 9 and accompanying text.

³⁰ The system for classifying the standards is a contribution of William Haddon, Jr., M.D., the first NHTSA Administrator, now president of the Insurance Institute for Highway Safety. See *infra*, note 32.

³¹ The standards in all three categories are collected in 49 C.F.R. 571.101—571.302.

³² See, e.g., Haddon, "Approaching the Reduction of Road Losses—Replacing Guesswork with Logic, Specificity, and Scientifically Determined Fact," presented at the National Road Safety Symposium, Canberra, Australia, March 1972, p. 4.

which can be prevented do not occur. Vehicles so designed are deemed "crashworthy."

"Crashworthiness" in essence entails two factors: one, the vehicle bears that brunt of crash forces before their energy reaches the occupant space;³³ two, occupants are restrained from crashing into the parts of the vehicle or out of the protective shell. This "second collision" or "passenger crash" is the subject of the controversial occupant restraint standard proposed by NHTSA as an amendment to Standard 208.

A proposal currently under consideration is to upgrade Standard 208 to replace the currently required "active" restraints (such as belts which require action on the part of the occupant before they are effective) with a requirement for "passive" restraints (such as air bags which come into play automatically in a crash). NHTSA has consistently favored passive restraints because, thus far, all efforts to encourage or force people to wear seat belts have had only marginal success.

2. Progress in issuing new standards

After an initial burst of activity in the first three years of its existence, NHTSA's issuance of new standards leveled off in the period from 1970-1973, during which 16 new standards were issued, and then fell off precipitously in the 1974-75 period, with but a single new standard issued in the 2-year period. NHTSA promulgated four new standards early in 1976. However, three of these are addressed to schoolbus safety and were issued in response to a direct Congressional mandate.³⁴

NHTSA's record of issuing new standards is summarized in the following table:

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION
ISSUANCE OF NEW RULES, 1966-75 *

Year	New vehicle standards	New manufacturer regulations	Cumulative total
1966-69.....	^b 29	2	31
1970.....	5	1	37
1971.....	3	4	44
1972.....	6	0	50
1973.....	2	5	57
1974.....	0	1	58
1975.....	1	3	62
1976.....	^c 4	0	66
Through Feb. 1, 1976.....	50	16	66

* Does not include amendments to existing standards, of which some are significant, some weaken the standard, and most are minor.

^b Many of the 1966-69 standards were enactments of previous standards promulgated by the Government Services Administration and by the Society of Automotive Engineers.

^c Three of these standards were issued to meet the mandatory requirements of sec. 202 of the Motor Vehicle and School Bus Safety Amendments of 1974. ³⁵

³³ This factor in turn breaks down into two elements, the ability of the vehicle's frame to manage or "soak up" the energy of the crash, and the ability of the sides and roof of the occupant space to prevent struck objects from crushing into the occupant space.

³⁴ NHTSA issued five schoolbus safety standards (three new standards and two upgraded standards) in time to meet the statutory deadline of January 27, 1976. The new standards are Standard 220, School Bus Rollover Protection, 49 C.F.R. 571.220; Standard 221, School Bus Body Joint Strength, 49 C.F.R. 571.221; and Standard 222, School Bus Passenger Seating and Crash Protection; 49 C.F.R. 571.222. These three new standards were all issued on January 22, 1976, and appear in the *Federal Register* of January 27, 1976 at p. 3874, p. 3872 and p. 4016 respectively. Existing standards extended to cover school buses are Standard 105-75, Hydraulic Brake Systems, 49 C.F.R. 571.105-75, 41 Fed. Reg. 2391. (January 16, 1976) and Standard 301, Fuel System Integrity, 49 C.F.R. 571.301, 40 Fed. Reg. 48352, October 15, 1975.

³⁵ 15 U.S.C. 1392.

While it is true that new standards alone are but a rough measure of NHTSA's productivity, others are equally crude. NHTSA has offered a tally of *Federal Register* citations from 1971 to the present to record its productivity.³⁶

NHTSA insertions in the Federal Register *

Fiscal year:	<i>Federal Register citations</i>
1971 -----	145
1972 -----	131
1973 -----	171
1974 -----	219
1975 -----	224
1976 (to Aug. 1) -----	129

* These citations include such actions as Advanced Notices of Proposed Rulemaking, Notices of Proposed Rulemaking, Rules, Amendments, Denials of Petitions, Corrections, etc. Preparation of these citations involves all offices within the NHTSA.

These figures are inflated in recent years by minor notices, including a large number of petitions for temporary exemptions to the standards filed pursuant to P.L. 92-548, the National Traffic and Motor Vehicle Safety Act Amendments of 1972, which allows such exemptions for small manufacturers and other special cases.³⁷

Only a handful of significant amendments to existing standards have been issued by NHTSA. These include: improvements in Standard 302 on fuel system integrity issued in 1974; upgrading Standard 105, on passenger car brakes (issued in 1973 and effective January 1, 1976); and upgrading and extending the applicability of the brake hose standard, FMVSS 106-74 issued in 1973. In addition, NHTSA was drawn into an extended controversy to defend the truck brake standard, issued in 1971, which came under heavy attack from regulated industry and the Council on Wage and Price Stability as its 1974 effective date approached.

Much more numerous, however, are improvements proposed by NHTSA, but never issued. These include seating and seat strength, a child-seating system, standards 201, 203 and 204 dealing with "passenger crashes," and others.³⁸

In summary, in recent years NHTSA has produced fewer and fewer significant rulemaking actions. What NHTSA has not done speaks louder than the few regulatory actions it has produced in recent years.

³⁶ *Hearings, supra*, note 18, at 435-36.

³⁷ 15 U.S.C. 1391.

³⁸ See, for example, letter of John E. Moss, Chairman, to Secretary of Transportation, William T. Coleman, Jr., January 19, 1976, which lists five such rulemaking actions:

"(1) Upgrading of the requirements for flammability of interior materials (FMVSS 302);

"(2) Improvement in the standard on energy absorbing steering columns (FMVSS 203/204);

"(3) Issuance of a standard on sharp protrusions from motor vehicles which unnecessarily multiply injuries inflicted on pedestrians, bicyclists, and motorcyclists when they are struck by these protrusions (Exterior Protrusions, Docket 2-5).

"(4) Incorporation of a dynamic test requirement in the child restraint standard (FMVSS 213).

"(5) Extension of the hydraulic brake standard to small trucks and vans (FMVSS 105)."

The letter is reprinted in *Hearings, supra*, note 18, at 480-481.

See also the Secretary's response, reprinted in *Hearings, supra*, note 18, at 482-483.

3. *The effectiveness of the standards: Have they made any difference?*

Evidence that the safety standards have saved a substantial number of lives is strong. Although fatality and injury data do not permit precise evaluation of individual standards, two recent studies indicate that groups of standards or the program as a whole are having a measurable effect.

The first is a study released in July 1976, by the General Accounting Office: "Effectiveness, Benefits, and Costs of Federal Safety Standards for Protection of Passenger Car Occupants." The GAO analyzed information on more than 2,000,000 cars in crashes in North Carolina and New York, comparing driver death and injury rates and model years of cars. The GAO found that the 1966-70 standards may have saved 28,230 lives between 1966 and 1974 nationwide. Compared to pre-1966 models, it found from 15% to 25% fewer deaths and serious injuries occurring in 1966 to 1968 model cars and 25% to 30% fewer in 1969 and 1970 models. GAO found little further improvement from standards introduced in 1971-1973 model cars. It also concluded that the 1966-1970 crash survivability standards produced economic benefits "that probably could be greater than the safety cost allocable to these standards."³⁹

A second recent study, "The Effects of New Car Safety Regulation on Fatality Rates,"⁴⁰ found that:

Cars sold prior to the beginning of such state or federal regulation—model prior to 1964—had an average yearly occupant fatality rate of 44 per 100,000 registered cars.

Cars with front outboard lap seat belts as standard equipment required by state law—1964 to 1967 models—as well as some crash protection installed in relation to General Services Administration (GSA) standards—mainly in 1967 models—averaged 35 occupant deaths per 100,000 registered cars, 20 percent less than pre 1964 cars. (Prior to the issuance of federal safety standards, GSA, the Federal government's purchasing agency, required that cars it purchased meet higher safety standards than generally available cars.)

For federally regulated post-1967—Cars, occupant deaths averaged 27 per 100,000 registered cars yearly, 23 percent less than 1964-1967 models and 39 percent less than pre-1964 models.

The report concluded that:

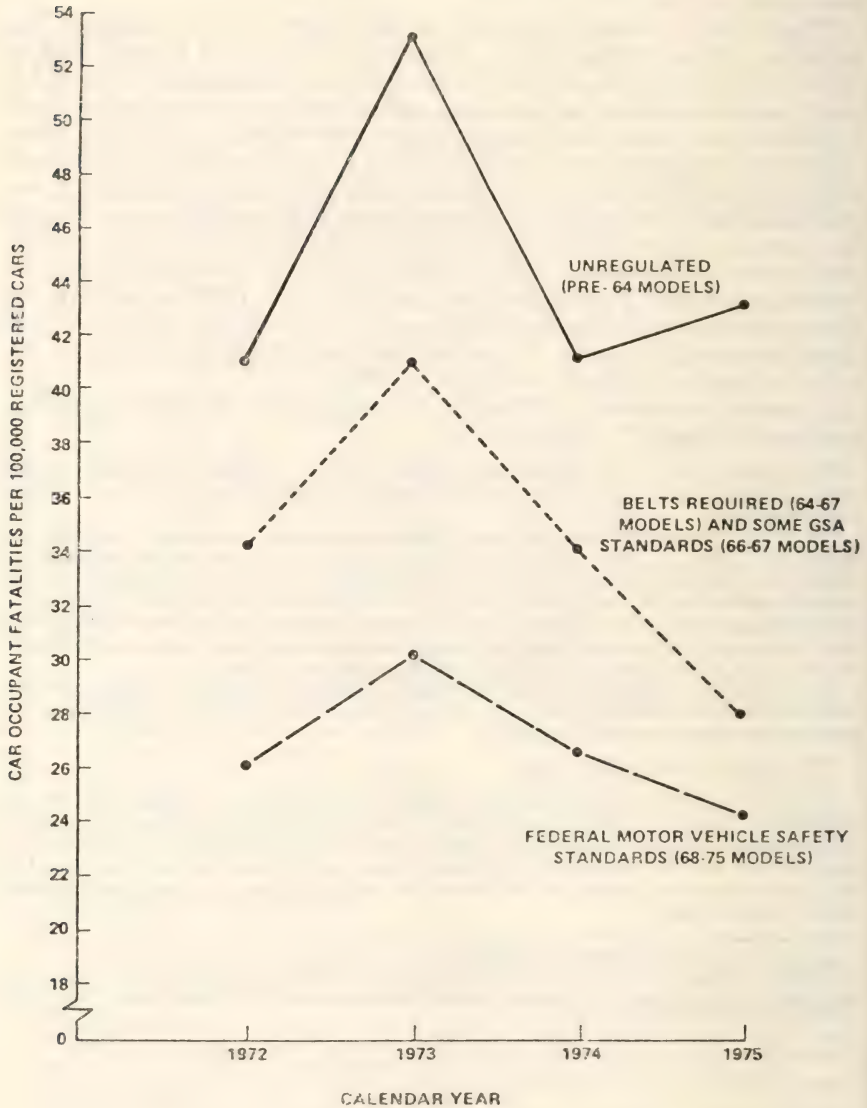
In sum, careful research methods that separate out the vehicles to which specific regulations applied reveal that, in the aggregate, the state and federal motor vehicle safety regulations issued in the 1960s and thereafter have greatly reduced automobile occupant fatalities. These regulations are not the end, but the beginning of a process to minimize the toll in human life that accompanies motor vehicle use.

³⁹ GAO Report CED-76-121, p. H (1976).

⁴⁰ Leon S. Robertson, Ph. D., Insurance Institute for Highway Safety, April, 1976, based on data from the State of Maryland, summarized in the Institute's *Highway Loss Reduction Status Report*, May 3, 1976.

The report's findings are indicated on the chart below :

CAR OCCUPANT FATALITIES PER 100,000 REGISTERED CARS
BY TYPE OF NEW-CAR SAFETY REGULATIONS
MARYLAND, 1972-1975



Another analysis, offered by the Center for Auto Safety,⁴¹ concluded that the issuance of safety standards beginning in 1968 after the passage of the Act has substantially reduced on the annual toll of deaths and injuries. According to the Center, fatality and injury figures, had they maintained the 1966 rate, would have been far higher than they are today. The figures cited by the Center are as follows:⁴²

In 1966, the death rate per 100 million miles travelled was 5.7. Even though only a few of the original safety standards have been updated, the death rate dropped to 4.2 deaths per 100 million miles in 1973. With the imposition of the 55 mph speed limit, the fatality rate per 100 million miles dropped to 3.6 and 3.5 in 1974 and 1975 respectively. If the auto safety standards had not been imposed and the traffic death rate had remained at the 1966 level of 5.7, then in 1973 some 74,613 individuals would have died in traffic crashes instead of the actual toll of 55,511. The difference of 19,102 lives, along with hundreds of thousands of serious injuries prevented or diminished, is directly attributable to safety standards.⁴³ When the effect of the 55 mph speed limit is factored in, the savings in lives goes up to about 30,000 in 1975.

Clearly, vehicle safety standards have been a principal contributor to the drop in fatalities and fatality rates.⁴⁴

A continuing decline in the fatality rate in recent months, even after the supply of gasoline recovered to the point of encouraging travel and frequent neglect of the 55 mile speed limit, although average highway speeds have been lowered, is further evidence of the effectiveness of the safety standards.⁴⁵

4. Can further safety standards result in greater reductions in fatalities?

In at least two directions safety standards might further reduce highway fatalities. Of the 45,700 traffic fatalities in 1974, between 30,000 and 35,000 were drivers or passengers. Improvements in occupant restraint alone can save many such victims. Dr. James B. Gregory, former head of NHTSA, told the Subcommittee:

I mentioned that in 1974 and again in 1975 traffic fatalities dropped by more than 9,000 as compared to 1973. In my view, only one other step in highway safety can be expected to produce an additional decrease of that magnitude within predictable time: either greatly increased use of present and improving "active" safety belt systems, or provision for so-called "passive" restraints.⁴⁶

The second possibility is to reduce pedestrian deaths, amounting to 8,300 of a total of 46,684 motor vehicle accident fatalities in 1974. Significantly, a recent study in Maryland of the 1972-1975 period found that vehicle safety regulations have had no apparent effect on

⁴¹ The Center for Auto Safety is a public interest auto safety advocate group based in Washington, D.C. It has participated actively in NHTSA rulemaking since its inception in 1970.

⁴² From testimony of Clarence M. Bitlow, III, Director, Center for Auto Safety, before the Senate Commerce Committee, June 29, 1976. (In press).

⁴³ The greater safety of interstate highways as compared to other roads, according to the Center, cannot account for the decrease in death rate since the death rate on Interstate Highways also decreased significantly from 1966 to 1973 with the phase-in of vehicles meeting the safety standards. In addition, some 23,500 miles of the Interstate System were already completed in 1966 with only an additional 10,400 miles being added by 1973. [Footnote in original.]

⁴⁴ Assigning precise credit is difficult if not impossible. For instance, the years 1974 and 1975 saw a dramatic drop of almost 10,000 in fatalities over the previous years. While the 55 mile speed limit took effect in this period, these were also the first years during which the safety improvements mandated by the initial group of safety standards could be found in the vast majority of cars. Because standards apply to new cars only, it takes about 10 years for vehicles containing the improvement to replace those produced prior to the improvement.

⁴⁵ Traffic fatalities in May 1976 dropped 3% below May 1975. It marked the eighth month in the last ten that the fatality count fell below the total for the corresponding month of the previous year. NHTSA News Release 44-76, June 23, 1976. All of these reductions have occurred after the 55 MPH limit took effect.

⁴⁶ *Hearings, supra*, note 18, at p. 419.

pedestrian fatalities. This finding was predictable given the fact that NHTSA's pedestrian standard, 7 years in the works, is still not on the books. This standard could eliminate hood ornaments and other sharp protrusions from the front ends of motor vehicles.

A number of other rulemaking actions planned or in progress at NHTSA also could reduce deaths and injuries.⁴⁷

Such savings in life and property are achieved, moreover, at low cost relative to the benefits. The total cost to U.S.A. consumers per passenger car for the Federal safety standards in effect to date is \$250.⁴⁸

The continuing cost to society of U.S.A. automobile death and injury has been estimated to range from as high as \$45 billion⁴⁹ to \$17 billion⁵⁰ annually. Vehicle damage, conservatively estimated, adds another \$5 billion yearly. Even at the conservative figure of \$22 billion⁵¹ the result is a staggering average of \$2,200 in losses per each U.S. automobile during its lifetime. If this figure represents total benefits achievable by vehicle safety and cost savings countermeasures, then NHTSA has wide latitude on the cost side in issuing new standards, before the total costs of the standards begin to approach the total benefits.

The pedestrian protection standard (in NHTSA terms, the "exterior protrusion" standard) is an example of a safety standard which could actually cut vehicle costs. Testifying at the confirmation hearing for NHTSA Administrator John Snow, Clarence Ditlow, Director of the Center for Auto Safety, stated: ⁵²

There is absolutely no utilitarian purpose served by an \$8.00 hood ornament that can spear an unsuspecting child. Here in the District of Columbia, a motorcyclist was recently awarded \$250,000 for permanently crippling injuries sustained when a Mercury veered into him with a spear-like parking light component puncturing his leg to the bone.⁵³ An exterior protrusion standard would prevent such injury with possibly a cost savings to the car buyer.

5. Factors contributing to slowdown in NHTSA safety standards program

The Subcommittee explored the question of NHTSA's slowdown in issuing new standards during an NHTSA regulatory reform/oversight hearing held on February 27, 1976. Though NHTSA officials testifying at the hearing did not entirely accept the notion of a slowdown, they nonetheless assisted the Subcommittee in seeking possible explanations. Among those which emerged from the discussion were the following:

- (1) the growing complexity of rulemaking actions ⁵⁴

⁴⁷ See *supra*, note 38, for a listing of these actions.

⁴⁸ Bureau of Labor Statistics "Report on Quality Changes for Passenger Cars" (model years 1968-1976). This total reflects a \$23 per vehicle reduction based on removal of the ignition interlock system in 1975 and excludes cost of voluntary safety improvements introduced by manufacturers.

⁴⁹ NHTSA, "Societal Costs of Motor Vehicle Accidents" Preliminary Report, April 1972, p. 1.

⁵⁰ Economics and Science Planning, Inc., (ESP) *Automobile Collision Data, An Assessment of Needs and Methods of Acquisition*, February 1975, p. 9.

⁵¹ This is the sum of \$17 billion in human damage and \$5 billion in property damage. From ESP, *supra*, note 50.

⁵² Hearings before Senate Commerce Committee, June 29, 1976. (In press.)

⁵³ *Kninen v. Ford Motor Co.* Civil Action No. 1725-72 (D.D.C. 1972).

⁵⁴ NHTSA Administrator, James B. Gregory testified:

"... As you move ahead from more or less standard practice that may have been in effect in the automobile industry regarding safety in the early days, toward the more complex effective ideas, you must use a higher degree of analysis.

"You also get a much higher degree of resistance. The communications with the public and increasing their safety awareness becomes more difficult.

"So you are indeed climbing up a mountain in many ways in this complexity. . . ." *Hearings, supra*, note 18, at p. 434.

(2) the narrow base of public support for specific rulemaking actions⁵⁵

(3) increasing resistance from industry⁵⁶

(4) involvement of the Council on Wage and Price Stability and the need for additional economic analysis prior to issuing standards⁵⁷

(5) political interference in NHTSA rulemaking by the White House Domestic Council, the Office of Management and Budget, and others.⁵⁸

The first three of these factors were recognized by the Subcommittee Chairman John E. Moss in his opening statement⁵⁹ as affecting to varying degrees, all product regulations.

The other two factors, both involving government groups outside of NHTSA, are the subject of the two immediately following case studies. Both are serious problems which the Subcommittee believes are appropriate for future Congressional action.

6. Conclusions

(a) There is good evidence that NHTSA safety standards save lives and reduce injuries to a significant and substantial degree.

(b) Further safety standards, if issued by NHTSA, including the upgrading of several existing standards, could materially reduce the number of deaths or injuries further without excessively raising costs.

(c) Despite a clear mandate from Congress to continue issuing standards, and the knowledge that further standards can lower fatality and injury rates, NHTSA has issued few standards since 1974.⁶⁰

(d) A number of factors have combined to slow NHTSA rulemaking. Although several of these factors seem inevitable, those involving political interference from the Council on Wage and Price Stability and others may be susceptible to correction.

B. THE USE OF BENEFIT/COST ANALYSIS IN NHTSA RULEMAKING

1. Introduction

Benefit/cost analysis may be prospective or after the fact. Prospectively, it weighs expected benefits against expected costs, usually in dollars.⁶¹

As applied to individual regulations or to regulatory programs, a benefit-to-cost ratio of greater than one is considered "positive." If

⁵⁵ On this aspect, Dr. Gregory stated:

"... As regulators, and particularly I think in this field that affects so many people directly, you have tendency to be criticized by the majority on almost any decision you make. I have said many times in interviews that in a regulatory area such as ours there is no 51% majority. As a matter of fact, if I get 12½% I consider it a landslide." *Hearings, supra*, note 18, pp. 432-433.

⁵⁶ See Gregory testimony, *supra*, note 54.

⁵⁷ See discussions in *Hearings, supra*, note 18, pp. 447-458.

⁵⁸ See, e.g., discussion of the White House role in the ignition interlock rulemaking, *Hearings, supra*, note 18, p. 467.

⁵⁹ The Chairman stated:

"This Subcommittee acknowledges that NHTSA has entered a phase in its history in which achieving further significant safety gains depends on carrying through with a number of rulemaking actions that will mean greater impositions on the industry, and will require vastly greater amounts of technical preparation and political courage on the part of NHTSA." *Hearings, supra*, note 18, at pp. 412-413.

⁶⁰ NHTSA, unfortunately, has discontinued its practice of updating periodically its "Program Plan for Motor Vehicle Safety Standards," last issued in October, 1971. This plan was a roadmap and schedule for new and upgraded standards.

⁶¹ This study uses the phrase "benefit/cost analysis" because the ratio of benefits to costs is one in which benefits is placed in the numerator and costs in the denominator. The term "cost-benefit analysis" is frequently used to indicate the same exercise.

the ratio is less than one, the benefits are assumed to be not worth the cost. Benefit/cost analysis is most acceptable when benefits and costs are easily expressed in dollar values: e.g., a project to construct a dam.

In applying benefit/cost analysis to health and safety regulation, the benefits consist of avoiding fatalities and reducing the number and severity of injuries. Here, no one method of putting a value on life or injury commands wide agreement.⁶² Even if a value for a human life could be agreed upon, the agency cannot estimate with confidence how many lives will be saved by a particular regulation.⁶³

Benefit/cost analysis has been advocated by those who seek a cut-back in Federal regulations. While it is rarely argued that a benefit/cost analysis should control a rulemaking decision, the Council on Wage and Price Stability and others urge that, at a minimum, a benefit/cost analysis or economic impact analysis should be performed in preparing any major regulatory decision, so that the results may be taken into account.

Benefit/cost analysis is least defensible as a prerequisite to health and safety rulemaking, where benefits are difficult to quantify. Its advocacy by executive bureaus is improper when Congress, explicitly or implicitly, has stated that benefit/cost analysis should not be required before issuing a regulation. Both of these situations arise in circumstances described below.

2. Did Congress intend benefit/cost analysis to be a prerequisite to issuing motor vehicle safety standards?

On the question of benefit/cost analysis, the language of Congress when it passed the legislation establishing the vehicle safety program is instructive. The National Traffic and Motor Vehicle Safety Act of 1966 sets forth explicitly the criteria to be considered in issuing motor vehicle safety standards:

"Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms."⁶⁴

In addition,

"In prescribing standards under this section, the Secretary shall consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed."⁶⁵

This language does not expressly refer either to economic or to bene-

⁶² Different methods which economists have used in assigning a value to human life are briefly summarized in O'Neill and Kelley, "Costs, Benefits, Effectiveness and Safety: Setting the Record Straight" Society of Automotive Engineers, No. 740988, 1974, p. 2. NHTSA itself has used the figure \$200,000 as the average cost of a fatality. The derivation of this figure is explained in "Societal Costs of Motor Vehicle Accidents," An NHTSA Preliminary Report, April, 1972, pp. 3-4. Critics of NHTSA generally cite lower figures. See, e.g., the figure of \$140,000 in Office of Science and Technology, "Cumulative Regulatory Effects on the Cost of Automobile Transportation (RECAT)," February 28, 1972, Appendix II-A, p. 2.

⁶³ NHTSA's problems in predicting how many lives it can save with a given action are not as insurmountable as those of agencies dealing with health hazards such as cancer, where the effects of a toxic substance, for instance, which is suspected of causing cancer, may not be known with any degree of certainty for 20 years. [See Chapters 4 and 15 for further exploration of this question] NHTSA's problems of prediction grow out of difficulties in accident investigation and reporting: Learning what injured or killed a person, how fast the vehicle was traveling, how severe the crash was, whether it was a single or multiple impact, etc.

⁶⁴ 15 U.S.C. 1392(a).

⁶⁵ 15 U.S.C. 1392(f) (3).

fit/cost analysis. However, the House Report explains this language in part as follows:⁶⁵

In establishing standards the Secretary must conform to the requirement that the standard be practicable. This would require consideration of all relevant factors including technological ability to achieve the goal of a particular standard as well as consideration of economic factors.

Similarly, the Senate report states that

"The Committee recognizes . . . that the Secretary will necessarily consider reasonableness of cost, feasibility, and adequate lead time."⁶⁷

What is significant about this language is its cautious approach to cost and economic factors. Although such factors were to be considered in issuing standards, there is no suggestion that costs be controlling: The legislative history stops well short of indicating that Congress intended to require a benefit/cost analysis before a standard was issued. To the contrary, the House of Representatives explicitly rejected an opportunity to require a comparison of benefits and costs in determining whether to issue vehicle safety standards. This rejection occurred in the process of considering amendments to H.R. 13228. Among the amendments offered was one by the Automobile Manufacturers Association which would have required the Secretary to include in each proposed safety standard a finding of fact with respect to whether the standard embodied "feasible devices and techniques that are available or can be made available in a reasonable time and *at costs commensurate with the benefit to be achieved.*"⁶⁸ (emphasis added) Despite lobbying, this language was not adopted. The U.S. Court of Appeals for the 6th Circuit addressed this issue in deciding the Chrysler (passive restraint) case in 1972, and stated:

None of these specific restraints sought by the Automobile Manufacturers Association was adopted, and we must decline to write into the Act the very same suggestions which the Congress declined to write into the Act.⁶⁹

In short, the Congress created a regulatory authority for the Secretary of Transportation granting a wide range of discretion, in which, in the words of the Senate report,

"... safety shall be the overriding consideration..."⁷⁰

Thus the Secretary, in issuing standards, is left to exercise his judgment in the application of a broad calculus of safety benefits, with a built-in bias toward standards which meet the need for motor vehicle safety.

3. NHTSA's use of benefit/cost analysis

The initial Federal motor vehicle safety standards, 29 of which were issued from 1967 to 1969, raised relatively few cost questions. This is because most of the initial standards were based on prior Government Services Administration standards for the purchase of government vehicles and thus incorporated existing industry practices.

⁶⁵ House Report, *supra*, note 5, p. 16.

⁶⁶ Senate Report, *supra*, note 2, p. 6.

⁶⁷ Hearings before the Committee on Interstate and Foreign Commerce, U.S. House of Rep., 89th Cong., 2d Sess., on H.R. 13228, "Part 2, Traffic Safety," p. 1203 (1966).

⁶⁸ Chrysler Corporation v. Department of Transportation, 472 F. 2d 659, 672 (6th Cir. 1972).

⁶⁹ Senate Report, *supra*, note 2, p. 6.

Only five of the initial standards required anything more than minor changes in the vehicle.⁷¹

The Agency has occasionally supported rulemaking decisions with reference to benefit/cost ratios. For example, NHTSA in interviews with Subcommittee staff cited its abandonment of rulemaking for truck rear underride guards on the basis that predicted costs far outweighed benefits.⁷² Questions of cost became a major issue with the proposal of passive restraint requirements in Standard 208 and with Standard 121 (truck air brakes).

Two recent developments are leading NHTSA to increase its use of benefit/cost analysis. The first is the recent activity of the Council on Wage and Price Stability in Federal rulemaking. The Council has a Congressionally-mandated mission to assess the inflationary effect of proposed Federal rulemaking actions.⁷³ On the strength of Executive Order 11821 and OMB Circular A-107,⁷⁴ which require that Federal proposals carry statements about their effect on prices, the Council has extended this mandate to press for benefit/cost assessments of Federal proposals it selects for close scrutiny.⁷⁵ The Council has been relatively active in NHTSA rulemaking, urging in several proceedings postponement or abandonment of proposed rules until economic analysis

⁷¹ Hefron, *Federal Consumer Safety Legislation*, a Special Report prepared for the National Commission on Product Safety, pp. 56-59, (1970). Hefron rates the early standard according to their "extent [of] vehicle changes required considering gross vehicle population in current production, including domestic and foreign manufacturers," in the following categories: "None" (2 standards) "Not Significant" (19 standards), "Minor Significance" (8 standards) and "Moderate Significance" (5 standards). He acknowledges that the standard rating process is inexact but his principal point remains valid: none of the initial standards or early revised standards required changes of major significance in the vehicle being produced.

⁷² Staff interview of Robert Carter, Associate Administrator for Motor Vehicle Programs, NHTSA, February 24, 1976. Carter took personal credit for this action, which he said was the agency's first decision based primarily on benefit/cost analysis. See 36 Fed. Reg. 11750 (June 18, 1971). The action was a part of a review of all standards then being proposed by NHTSA. The review resulted in eliminating 22 lesser known proposals. 36 Fed. Reg. 1120 (Jan. 25, 1972). Carter said that since then, NHTSA has been using benefit/cost studies but in a limited way.

⁷³ Public Law 93-387, 12 U.S.C. 1904, (enacted August 24, 1974) establishes the Council and directs it—among other tasks—to:

"review and appraise the various programs, policies, and activities of the departments and agencies of the United States for the purpose of determining the extent to which those programs and activities are contributing to inflation."

The Council on Wage and Price Stability Act Amendments of 1975, Public Law 94-75, 12 U.S.C. 1904, (enacted August 9, 1975), expressly authorizes the Council to:

"intervene and otherwise participate on its own behalf in rulemaking, ratemaking, licensing and other proceedings before any of the departments and agencies of the United States, in order to present its views as to the inflationary impact that might result from the possible outcomes of such proceedings."

⁷⁴ Executive Order 11821, signed by President Ford on November 27, 1974, (39 Fed. Reg. 41501) orders the preparation of inflationary impact statements for all "major proposals for legislation, and for the promulgation of regulations or rules by any executive branch agency . . ."

Office of Management and Budget Circular A-107, dated Jan. 28, 1975, implements the Executive Order, and orders each agency to develop procedures for the evaluation of such major proposals. It states:

"The evaluation should include, where applicable, . . .

"(2) a comparison of the benefits to be derived from the proposed action with estimated costs and inflationary impacts. These benefits should be quantified to the extent practical . . ." OMB Circular A-107, p. 2.

⁷⁵ The Subcommittee's Hearings on NHTSA addressed this extension of authority as follows:

Mr. Moss. As one of the authors of the basic legislation it is my recollection that this committee rejected economic impact analysis as being a prerequisite for the promulgation of regulations, and any effort by the Cost of Living Council or the Council on Wage and Price Stability to impose such a requirement is violative of the law as clearly as anything could ever be.

I would say to them that if evidence persists that they are trying to do so, I will summon them before this committee and have them put on the public record exactly where they derive their authority.

Mr. Gregory. Mr. Chairman, I respectfully say that I also have to operate under Executive Order 11821 from the President, on analyzing the inflationary impact.

Mr. Moss. Doctor, Executive orders do not supersede statutory law. Nor does this Member ever intend to suffer that to happen. *Hearings, Supra*, n. 18, at p. 448-449.

demonstrates that benefits will exceed costs.⁷⁶ With the imprimatur of the Executive Office of the President on its "requests", the Council has been quite successful in interjecting its views in rulemaking proceedings.

The second development is a set of three so-called regulatory reform policies issued by Secretary of Transportation William T. Coleman, Jr., on April 13, 1976.⁷⁷ The first requires an evaluation of the costs, benefits, and other effects, quantified to the extent possible, for all DOT rulemaking actions prior to their issuance either in proposed or final form. The second requires that Departmental elements such as NHTSA inform the Secretary with memoranda on regulations which are potentially costly or controversial at least 30 days prior to their proposed publication. The third reflects the beginnings of a Departmental process for evaluating regulations already in place.

On May 17, 1976, Subcommittee Chairman Moss asked Secretary Coleman whether the new policies, which were effective on May 1, 1976, exhibited sufficient sensitivity to the statutory criteria governing the issuance of Federal motor vehicle safety standards. He wrote:

This Subcommittee, which has been assigned oversight responsibility for the National Highway Traffic Safety Administration, is concerned with the impact of these new policies on NHTSA's program of Federal Motor Vehicle Standards. In particular, we wish to assess the conformance of these policies with the statutory criteria for rulemaking set forth in the National Traffic and Motor Vehicle Safety Act of 1966.

The Secretary has agreed to share with the Subcommittee the documents he receives under this new policy, to enable the Subcommittee to monitor the Secretary's application of the statutory criteria to rulemaking decisions the Department has reached.

4. *Limitations on the utility of benefit/cost analysis in NHTSA rule-making*

NHTSA Administrator, John Snow, sworn in by Secretary Coleman on July 8, 1976, offered his own view of the role of benefit/cost analysis in NHTSA rulemaking in questioning prior to his Senate confirmation:⁷⁸

Benefit/cost analysis is no substitute for good judgment but it can help to inform good judgment.

The experience of NHTSA itself is perhaps the best indication of the limitations of the use of benefit/cost analysis. Our study has led to the following observations.

(a) Factors other than benefit/cost comparisons sometimes are given more weight by Congress and NHTSA

Even where benefit/cost assessments are available, they may be ignored altogether in reaching decisions. Because of public policy con-

⁷⁶ In addition to the Council's ongoing participation in passive restraints rulemaking (FMVSS 208) and the issuance of the truck air brakes standards (FMVSS 121), the Council has also submitted written comments on Standard 105-75, Hydraulic Brake Systems (February 11, 1975); Docket 75-25 Notice 1, Cost Information Reporting, (November 26, 1975); and Uniform Tire Quality Grading, (June 9, 1975). The Council's input in these proceedings is consistently along the lines of the following example:

"The Council on Wage and Price Stability makes the same request with regard to Standard 105-75 that it did with respect to Standard 121—that the implementation of the Standard be indefinitely delayed pending a detailed, formal evaluation of its economic impact." (Comments of February 11, 1975, p. 3.)

⁷⁷ 41 Fed. Reg. 16200 (April 16, 1976).

⁷⁸ Snow response to question 5b of questions put to him by the Senate Commerce Committee prior to his confirmation hearing on June 29, 1976.

siderations, schoolbus standards were issued even though measurable benefits may not exceed known cost.⁷⁹ In another instance, NHTSA was directed to abandon safety standards whose observable benefits were significant: the ignition interlock system produced substantial measurable results in increased belt usage and in corresponding reductions in death and injury, but was repealed in response to public protest.⁸⁰ In both cases, Congress acted without regard to the NHTSA benefit/cost analysis. The Congress ordered NHTSA to issue a specified group of schoolbus standards, even though NHTSA, up to the time of the passage of the 1974 Motor Vehicle and Schoolbus Safety Amendments, had cited the low number of deaths and injuries to students riding buses as a basis for refusing to issue these standards. Opponents of the ignition interlock standard cited alleged public dissatisfaction, which they deemed to be more important than its positive benefit/cost ratio.⁸²

The threat of popular protest led NHTSA not to press at least one standard, despite the prospect for positive benefits. This was the proposal to limit the speed achievable by motor vehicles, on the assumption supported by the effects of the national 55 mile per hour limit, that effective limits on speed will reduce the number of fatalities. The mere whisper of this proposal by NHTSA in 1970 precipitated a flood of hostile mail.⁸³

Occasionally, NHTSA fails to issue a standard with the prospect of high benefits because of difficulties in shaping the rule. Such difficulties have prevented NHTSA from issuing a pedestrian protection standard; i.e., the agency said it could not devise a suitable test which would enable manufacturers to determine whether vehicles met the standard.⁸⁴

⁷⁹ In a 1974 Notice of Proposed Rulemaking for school bus crashworthiness, issued prior to Congressional action mandating schoolbus standards, NHTSA stated that it "has conducted convention cost-benefit studies on schoolbus safety, but the normal valuation techniques evidently do not adequately reflect general public opinion on the importance of protecting children from death or injury. It is obvious from voluminous mail and Congressional interest that society places a much higher value on the safety of its children than a conventional cost-benefit analysis would indicate." (emphasis added.) 39 Fed. Reg. 27585 (July 30, 1974).

⁸⁰ 15 U.S.C. 1410b.

⁸¹ In a letter dated July 9, 1975, to Members of the House, Chairman Harley O. Staggers of the Committee on Interstate and Foreign Commerce explained:

"The Congress believed it necessary to make specific requirements for school bus safety due to years of delay by DOT in issuing such standards. This delay was partially due to DOT's belief that additional schoolbus standards were not justified on a cost-benefit basis; however, the Congress concluded that the safety of school children is a concern which overrides purely economic considerations."

A serious crash occurred on May 21, 1976, in Martinez, California when the brakes failed on a schoolbus carrying 52 students. The bus flipped over a guard rail and fell 20 feet. Twenty-nine died and 23 were injured. See NHTSA's *Preliminary Report*, Multidisciplinary Accident Investigation, June, 1976. This crash highlights the potential for a large number of deaths and injuries that can occur in a single schoolbus crash. This potential is a added factor in confirming the need for improved schoolbus safety standards.

⁸² The actual number of citizen letters to NHTSA complaining about the interlock did not indicate widespread dissatisfaction. However, opponents made much of the problem associated with its use (need to buckle up groceries placed on the passenger side from seat, etc.) and prevailed in the Congress.

⁸³ The idea was first proposed as an advance notice in 1967. 32 Fed. Reg. 14280 (Issue October 11, 1967). On November 23, 1970 NHTSA issued a revised proposal, indicating a October 1, 1972 effective date. 35 Fed. Reg. 18295. The proposal has remained dormant ever since.

⁸⁴ This was the rationale frequently provided by NHTSA Administrator Douglas Tomlin (1971-1973). More recently, the Department of Transportation has stated a further reason for holding off on the standard:

"The NHTSA is holding in abeyance its rulemaking on exterior protrusion protection until basic research is more advanced on the fundamental problems of pedestrian injuries and deaths from motor vehicles. Because the accident data indicate that the vast majority of injuries caused by motor vehicle impact into pedestrians are 'blunt trauma,' the agency considers that the most reasonable rulemaking action would address the 'hostility' of the vehicle body as a whole and not establish arbitrary limits on sharp protrusions in the interim. The NHTSA is planning to issue a proposal for general pedestrian protection in 1979." Letter to Hon. John E. Moss from Secretary of Transportation William T. Coleman, Jr., March 1, 1976. Printed in Hearings, *supra* note 38, p. 482-483.

In short, benefit/cost calculations, if performed, frequently play no part in determining NHTSA decisions.

(b) *NHTSA has encountered serious difficulties performing benefit/cost analysis*

i. Data for the cost side of the benefit/cost ledger have been elusive at best; e.g., NHTSA's proposed passive restraint rule, with cost estimates ranging from \$31⁸⁵ to \$405.⁸⁶ A program which calls for *performance* standards (e.g., pedestrians shall not be injured when struck by vehicles travelling 10 mph or less) rather than *design* standards (e.g., cars are not permitted to have hood ornaments) leaves the choice of the specific means of meeting a standard to the manufacturers. This is as it should be. However, a performance standard leaves NHTSA with the task of estimating costs for designs that are hypothetical; it cannot know exactly how much a standard will cost until after it is applied; i.e., until it learns how manufacturers choose to meet a standard. Costs are a problem also because of the unwillingness of manufacturers to impart basic cost information. Suppliers of auto components also dislike to reveal their costs lest they alienate the automobile manufacturers. For this reason, the Congress granted NHTSA express authority in 1974 to obtain cost data from manufacturers whenever they object to a standard on the basis of the expense.⁸⁷ Up to August 1976, NHTSA failed to use this authority. This could be because supply cost data are useless unless the various components of costs are separated and the basis for each made clear. Cost data rarely come in this form. While NHTSA can require manufacturers to furnish cost data in useful form, it has not yet issued such a regulation.⁸⁸

ii. The benefits side of the ledger, as suggested above, presents almost insuperable difficulties. Agreement on an approach to valuing human life is unlikely because the effort involves subjective judgments. Even if participants in evaluation recognize that it is not life itself or injury that they are appraising but only the amount of money society is willing to pay to avoid a serious injury or fatality, little basis exists for agreement.

iii. Projecting benefits and costs of a proposed countermeasure for a span of years presents other difficulties even if an estimate of initial benefits and costs is agreed upon. NHTSA's projections are uncertain because long-term data are lacking. Although cost estimates for the ignition interlock system, when initially introduced, were in the \$40 to \$50 range, a savings to consumers of only \$23 resulted from its elimination a year and half later.⁸⁹ NHTSA's current effort to learn from the manufacturers how many dollars they could save by eliminating the hardware that is today required by standards which went into

⁸⁵ Cost of the "passive belt" system available as an option in the 1976 Volkswagen Rabbit. (In practice, the option is available only as a part of a "custom package" costing more than this amount.)

⁸⁶ Cost-estimate of Toyota passive restraint system (including a lap belt), offered by Toyota at Department of Transportation Public Meeting, August 3, 1976.

⁸⁷ Public Law 93-492, Section 103; 15 U.S.C. 1402.

⁸⁸ NHTSA issued a proposed regulation on cost information reporting to implement this provision of the 1974 Amendments. 40 Fed. Reg. 42365 (Sept. 12, 1975).

The Council on Wage and Price Stability then filed comments on November 26, 1975, suggesting that NHTSA's requirement to obtain cost information from the manufacturers might be amended, ironically, so as not to impose additional costs on the automakers.

⁸⁹ The average additional cost increase brought about by the interlock requirement, according to NHTSA, was \$46.80. See *Hearings, supra*, note 18, p. 454. The reduction of \$23 is from U.S. Department of Labor, Bureau of Labor Statistics, telephone conversation with Subcommittee staff, August 26, 1976.

effect 10 years ago may yield some interesting information with respect to long-term costs of safety standards.⁹⁰ Projection of benefits encounters similar problems, illustrated by disparities among the predictions of lives potentially saved by a passive restraint standard. Estimates contained in NHTSA's rulemaking docket as of May 1975 for net lives saved (that is, lives saved if all cars were equipped with passive restraints, less lives saved by safety belts, assuming realistic rates of usage) were as follows:⁹¹

GM	2,700
Economics and Science Planning	3,000
Ford	3,600
NHTSA	8,900
De Lorean Corp.	19,000

The diversity in these estimates demonstrates why benefit/cost studies degenerate into arguments when they are applied. The most significant factor in evaluating a benefit/cost study is the name of the sponsor.⁹² Benefit/cost studies generally are formulated after basic positions on an issue are taken by the respective parties. The results of competing studies predictably reflect the respective positions of the parties on the issue.

(c) Demand for benefit/cost analysis as political opposition to a proposal

We are especially distressed by the demands for improved and more extensive benefit/cost studies voiced with increasing intensity by groups such as the Council on Wage and Price Stability, despite the weakness of the data. The Council beats the benefit/cost drum loudly. Although much of the Council's participation is in the open, in the form of comments to rulemaking dockets and presentations at public meetings, the Council operates most effectively behind the scenes, coordinating closely with the Domestic Council in the White House and resorting to off-the-record telephone communications and confidential memoranda extensively.

An example is the following memorandum:

THE WHITE HOUSE,
Washington, January 17, 1975.

Administratively confidential

Memorandum for: John Barnum.

From: Mike Duval.

Subject: Truck brake regulations (MVSS 121).

I was very disturbed to see a copy of Jim Blum's letter to Jim Gregory.

I discussed this matter with Secretary Brinegar by telephone in great detail prior to making my report to the President. We went into further detail on his memorandum to the President on the final rule in which he stated:

The Council on Wage and Price Stability initially asked that the rule be delayed, but after a staff review of the situation it is now agreed that it is proper to proceed, with careful monitoring of the costs and benefits.

In approving Secretary Brinegar's recommendation, the President understood that DOT would comply with the Council on Wage and Price Stability position which was: a continuing study was underway, aimed at getting immediate

⁹⁰ This review is not yet complete. The problem is discussed by former NHTSA Administrator Gregory in *Hearings*, *supra*, note 18, p. 419.

⁹¹ *Hearings*, *supra*, note 18, at 486-487.

⁹² The De Lorean Study, for example, (entitled "Automotive Occupant Protective Safety Air Cushion Expenditure/Benefit Study") was sponsored by the Allstate Insurance Company, one of the foremost advocates of the air bag system.

economic impact results and if a cheaper way can be developed to meet the safety goals, your regulation would be modified to allow for the cost-saving method.

Please ensure that the National Highway Traffic Administration [sic] works this matter out immediately with the Council on Wage and Price Stability. May we please have a report from you once this has been accomplished, but certainly no later than a week from today.

Thank you very much.

A recent staff reassessment of the Council's role in the issuance of Standard 121⁹³ indicated that this standard went forward only with the concurrence of the Council and then only on the strength of a NHTSA promise to the Domestic Council to conduct a continuing analysis of the costs and benefits of a standard.⁹⁴ The introductory language to NHTSA's first effort to meet this commitment, entitled "Economic Impact of FMVSS 121: A Quick Look Evaluation," April, 1975, is instructive:

Its primary purpose is to provide immediate estimates of relevant cost and benefits factors in response to *irresistible demands* for an accounting, however crude or speculative, of the standard's economic impact . . . (emphasis added)

The Council's ostensibly well-intentioned interference could not be better calculated to induce paralysis by analysis in NHTSA rule-making. Standard 121 has moved forward but others, including the passive restraints proposal, are likely to run afoul of demands by the Council to hold up action while the Council presses for analyses that can not be performed.

(d) *The role of benefit/cost analysis is susceptible to misunderstanding*

Because the limitations of benefit/cost analysis are not widely understood, misunderstandings arise frequently: e.g. a concurring opinion in the *H&H Tire Company* decision in the U.S. Court of Appeals for the 7th Circuit. The opinion states:

Although I recognize that safety is the "overriding consideration in the issuance of standards under this Act, the statute requires respondent to consider whether a proposed standard is "reasonable, practicable, and appropriate" before it is prescribed. In my opinion, this duty has not been discharged until respondent has at least identified some of the costs associated with the proposal and determined that these costs are overridden by reasonably predictable benefits. Since no such consideration is evidence by this record, I agree that respondent failed to perform his statutory duty.⁹⁵

With due respect for the Court, this concurring opinion faithfully reflects neither the legislative history of the 1966 Act nor the current state of the art of benefit/cost analysis.

5. *Future use of benefit/cost analysis by NHTSA*

Our findings suggest the need for caution in applying benefit/cost analysis to NHTSA actions, whether used to support a rulemaking decision or limited to arranging priorities among possible actions. The Subcommittee proposes the following guidelines for NHTSA in applying the benefit/cost device.

First, NHTSA should acknowledge the genuine limitations of benefit/cost analysis with respect to proposed rulemaking, now and for the immediate future. In its place, the Administrator should press to obtain as much cost data as possible before reaching a regulatory de-

⁹³ Issued in revised form on February 26, 1976 (41 Fed. Reg. 8783).

⁹⁴ A statement of this promise is contained in the Duval memorandum.

⁹⁵ *H&H Tire Co., v. U.S. Department of Transportation* 471 F. 2d 350, 356-357 (1972).

cision. The Administrator should also press for as refined a prediction as possible of projected benefits, expressed not in dollar values but as fatalities and injuries which can be avoided or reduced. Cost figures and benefit estimates developed in this way can legitimately be taken into account, but only as separate inputs. Because of weaknesses in the data on both sides of the ledger, and because in any event the values on the respective sides cannot be expressed in comparable units weighing one against the other can be misleading.⁹⁶

Second, NHTSA should increase the effort to improve the quality of its benefit/cost analysis. Initially, the focus should be on the completion by NHTSA of its efforts to develop a respectable data-gathering and analysis system. Until NHTSA knows how fatalities and injuries are spread across different crash modes and across different speed ranges in greater detail and with greater reliability than at present, the calculation of potential benefits will remain crude. Until such deficiencies are substantially reduced, the usefulness of benefit/cost studies to NHTSA will remain doubtful.

Third, once the benefit/cost analysis is sufficiently refined, it is to be applied most appropriately at the outset *not* to the process of issuing new standards but in assessing the merits of standards in effect. In the *evaluation* of applied safety standards benefit/cost analysis will find fertile ground for development and growth. Because designs have been selected and incorporated into production, analysts will have a better access to actual costs. Similarly, the analysis of benefits at this stage can be based on a record of events. The attempt to prophecy the future, if necessary, is better if based on experience instead of imagination.

Fourth, NHTSA should concentrate on developing a capability to eliminate useless standards. Such a change in policy (applying benefit/cost analysis to the period after rulemaking has been in effect and to the identification and elimination of useless standards) presupposes a rare commodity, the courage to recognize and admit past error or changed circumstances. Initial rulemaking decisions must inevitably be based on judgment that is for the most part less than fully informed; NHTSA, of course, has exercised that judgment to the best of its ability. NHTSA today must be prepared to amend or appeal regulations flexibly now that it is possible to look at the consequences of earlier judgments.

This flexible approach suggests a reasonable threshold for issuing new and upgraded safety standards. The reasonable threshold must go hand-in-hand, however, with the practice of re-examining carefully the standards in place and aggressively weeding out those which do not continue to show acceptable results.

C. POLITICAL INTERFERENCE AND NHTSA'S FAILURE TO ISSUE A PASSIVE RESTRAINT STANDARD

The inability of the National Highway Traffic Safety Administration to issue a passive restraint standard, after 7 years, stands as a

⁹⁶ It is possible to substitute "cost-effectiveness analysis for cost" benefit analysis to avoid the problem of quantifying benefits. A cost/effectiveness study indicates how many lives can be saved at a given level of costs without attempting to put a dollar value on the lives saved. However, cost/effectiveness is not particularly useful in weighing the value of an individual standard; its application is best suited to comparing the relative cost efficiency of a group of alternative proposals.

case study in the difficulties which beset a regulatory agency that moves into controversial territory.

1. Introduction

(a) *What is at issue?*

A passive restraint rule has been a top priority of NHTSA since it was initially proposed in July 1969.⁹⁷ A "passive restraint" works automatically in a crash to keep passengers from slamming forward into the windshield, dash, door, or steering column. The air bag system, a cushion which inflates instantaneously in a crash, is an example of this type of restraint. Passive restraints are under consideration because so many motorists neglect to use seat belts and because laws requiring belt use frequently are regarded as politically unacceptable and unenforceable. The passive restraint proposal has earned the support of each NHTSA Administrator since the early days of the agency because of the high benefits predicted: about 11,000 fatalities avoided and 170,000 injuries reduced or avoided each year, when air bags are in all cars.⁹⁸ The professional staff of the agency, and in particular the head of NHTSA's rulemaking arm, have forcefully advocated the rule since 1969.

National controversy over the proposal has sharply polarized advocates and opponents of the system. If the manufacturers were to opt for air bags as the preferable method for meeting the passive restraint standard (major manufacturers except for Volkswagen⁹⁹ have indicated they would opt for air bags.), its adoption would impose significant design, testing, production, and potential liability burdens on manufacturers, as well as significant cost burdens on consumers. Although the ultimate cost of mandatory air bags to consumers is disputed, only the most passionate advocates argue that the cost is likely to be minor. Some have claimed that, because supplier prices for air-bag components total less than \$100, the cost does not need to be a major impediment. NHTSA in a July 1976 paper entitled "Consumer Cost of Occupant Restraint Systems" estimated the increased price of a new car with front seat air bags and lap belts (over the cost of present restraints) to be \$103. These estimates, however, tend to ignore the fact, in the absence of new legislation, the auto manufacturers retain authority to set prices for their safety equipment, including equipment required by government regulation. If their currently projected retail price increases from air bags (in the \$220-\$405 range) prove correct, then this standard, if promulgated, could cost consumers as much or more than the total of the other 50 Federal motor vehicle standards combined.¹⁰⁰

Opponents of air bags put the emphasis on cost while advocates, not surprisingly, emphasize the projected benefits. However, benefit/cost analysis has not proven helpful in this controversy. No two analyses show like results.¹⁰¹ In addition, other factors have entered

⁹⁷ Issued June 26, 1969; published 34 Fed. Reg. 11148, (July 2, 1969).

⁹⁸ From Table I. of Secretary Coleman's Occupant Crash Protection Notice of June 9, 1976; 41 Fed. Reg. 24072 (June 14, 1976). The figures assume a 20 percent lap belt usage rate, air bags in front seats only, and air bags set to deploy only at a crash severity exceeding the equivalent of a crash into a fixed barrier at 12 mph.

⁹⁹ Volkswagen prefers a system of "passive belts," available as an option on its Rabbit model. Passive belts automatically move into place around entering occupants.

¹⁰⁰ The safety standards to date have added an average of approximately \$250 to the retail prices of new automobiles, according to the Bureau of Labor Statistics. See *supra*, notes 48, 89.

¹⁰¹ See *supra*, note 91 and accompanying text.

the debate, including whether society really wishes to pay for passive protection or really desires the benefits promised.

(b) *Air bags and other passive restraints: The state of the art*

(1) *The Air Bag, Design and Practice*

Although there are many forms of passive restraints, including passive seatbelts (which take their position automatically around the entering occupant), the most advanced is the air bag. It is designed to work only when needed; that is, in an injury-threatening crash.¹⁰² The air bag, triggered by sensors as the crash begins, is in place in about 30 milliseconds. As passengers are thrown forward in the crash, their heads and chests pitch into an air cushion instead of into glass or steel. The air bag then deflates instantaneously. When an occupant moves into an inflated bag, the crash forces are distributed across the entire body, rather than concentrated at a few points, as with seatbelts. Moreover, occupants are cushioned against an abrupt blow. The technical problems associated with development of the air bag, including noise, toxicity of gases used to inflate the bag, danger breaking eyeglasses, reliability of activation, injury to out-of-position occupants, and disposal, have been largely resolved. Secretary of Transportation Coleman, in a recent notice, stated, "[b]oth laboratory experience and the limited field experience during the past several years indicate that these factors do not constitute a significant risk."¹⁰³

(a) *Advantages of the air bag*

What distinguishes the air bag is that it works without need for action on the part of the user. Also, stored out of sight, it does not interfere with vehicle operation or with movements of passengers or driver. Some tests have shown air bags to be more effective than seat belts in crashes above 25 to 30 miles an hour as, at such crash speeds, seatbelts tend to inflict chest injuries and have been known to fail.¹⁰⁴ Air bags promise to protect the head and neck from injury at high crash speeds more than belts. Because the crash victim's face goes into the bag, it is protected from flying objects, including slivers of glass.

It is argued also that air bags are the best way to protect riders in small cars, a growing concern.

(b) *Disadvantages of the air bag*

Because air bags, as currently designed, do not offer protection in rollovers, lap belts will still be needed for maximal protection. Although one General Motors system was designed to replace belts,¹⁰⁵ General Motors no longer promotes this concept.

Replacement costs of air bags are higher than initial cost, but replacement may not be needed as crashes which will inflate air bags will

¹⁰² Before it is set off, the driver bag is stored in the hub of the steering wheel. The passenger side bag, which is larger, is stored in the lower part of the dash panel.

¹⁰³ 41 Fed. Reg. 24074 (June 14, 1975.)

¹⁰⁴ See, e.g., statement of Clarence Ditlow III, Executive Director, Center for Auto Safety, at Department of Transportation meeting on occupant restraints and standards, August 3, 1976, p. 3, 5.

¹⁰⁵ General Motors produced a fleet of 1,000 1973 model Chevrolet Impalas equipped with front seat air cushions and no belts. The vehicles were used in test fleets, including one sponsored by NHTSA with the U.S. Park Police in Washington, D.C. General Motors' initial enthusiasm for air cushions was reflected in part in its assertion that air bags would replace belts to permit a "cleaner" vehicle interior.

possibly "total" the vehicle. The proportion of these crashes is unknown.

Air bags are designed to inflate only in crashes equivalent to hitting a parked car at 25 miles per hour. The risk of injury from crashes at speeds below this level will continue. Car makers have expressed concern about their liability for damages resulting from malfunctioning air bags. General Motors has been sued seven times but the result of these suits remains to be learned.¹⁰⁶ Suitable air bag systems for small cars have not been completely developed.

(c) *Experience with the air bag*

General Motors has offered air bags as an optional since the fall of 1973. About 10,000 air bags were installed on 1974, 1975, and 1976 models.¹⁰⁷

In road tests over 260 million miles of some 12,000 air-bag-equipped cars, air bags have performed essentially as designed. Up to mid-1976, there were 103 crashes serious enough to inflate the air bags. Four riders died in these crashes but 125 front seat occupants survived.¹⁰⁸ Six "non-crash" or accidental inflations were reported.¹⁰⁹

Passengers who survived crashes in air-bag cars have become ardent advocates for the device. Some are confident it saved their life. In addition, volunteers have survived test crashes at high speeds without injury.¹¹⁰

General Motors and others have developed and tested air bag systems for small cars, where occupant restraint is much more critical than in larger cars. Former GM Vice President, John Z. De Lorean, expecting a sizable increase in small cars sales over the next 10 years, has predicted that fatalities will increase by 40% before 1985 unless air bags or the equivalent are installed in all new cars, including small cars.

(2) *Other Passive Restraints*

While some companies have started development work on passive devices other than air bags (deployable blankets and nets, massive layers of padding, movable bolsters, inflatable belts, etc.) only "passive belts" are currently available. These are belts which automatically move into place around the driver and front seat passenger when they

¹⁰⁶ A brief summary of these court actions is contained in Hearings, *supra*, note 18 p. 462-463.

¹⁰⁷ *Id.*, p. 446.

¹⁰⁸ Insurance Institute for Highway Safety, "Air Bags: A Statistical Sketch," from *Press Background Manual on Air Bags*, August 1, 1976, p. 1. The footnote on four occupant deaths reads:

"For two of the fatalities, National Highway Traffic Safety Administration-sponsored investigators concluded that because of the great violence of their crashes, and extensive occupant compartment disintegration involved, no known crash packaging could have saved their lives. In a third fatality, an unrestrained infant's head struck the instrument panel when he slid off the seat during pre-impact braking. The fourth fatality involved an approximately 30 mile per hour offset frontal crash with a wooden utility pole. It is not known whether the driver died before, during, or after the crash."

¹⁰⁹ *Id.*, p. 1. The six took place as follows:

"Two 'non-crash deployments' occurred as the result of inadequate designs which were corrected. One occurred because a sensor had not been rebolted properly after non-air-bag-related repairs. Another resulted when a hazardous cargo exploded, damaging the car and deploying its air bag, the sensor for which correctly detected crash forces of serious magnitude. Three others occurred when crash sensors were inappropriately handled during repair work unrelated to the air bag. None of these deployments was collision related nor caused collisions."

¹¹⁰ In one crash, a Hollywood stunt driver, performing for a company filming a police chase, crashed his air-bag equipped vehicle into a barrier at 22 mph, the equivalent of a 64 mph car-into-parked-car crash.

enter. Passive belts can be purchased as an option on 1976 Volkswagen Rabbits, as a part of a comfort package for the top-of-the-line Rabbit.

About 50,000 passive belt systems are now in use. Experience to date is mixed. While owners of passive belt systems have higher use rates, only 79 percent of the owners polled in one study reported wearing belts "almost always."¹¹¹

According to Volkswagen of America, of 42 crashes investigated, 46 occupants of Rabbits equipped with passive belts were wearing the protective device. None were killed. No serious or critical injuries were found. Moderate to minor injuries totaled 20. One "severe injury" reported was not classified as life-threatening. In this crash, the Rabbit was a total loss. Of the 46 occupants, 25 had no injury.¹¹²

2. *Passive restraint rulemaking: A chronology*

Both Ford and General Motors began experimental testing and development of air bag systems in the mid 1950's. Based on meetings in 1968 and with auto manufacturers, the NHTSA Administrator (then William Haddon, Jr., M.D.) first proposed air bags in a July 1969 advanced notice of proposed rulemaking, which contained a January 1972 effective date.¹¹³ Soon thereafter, NHTSA made two key changes in its proposal. First, it shifted from proposing "air bags" to proposing "passive restraints," a shift from a design standard to a performance standard in order to allow manufacturers to use any one of a number of possibly acceptable systems. Second, NHTSA put off its proposed effective date from January 1, 1972 to August 15, 1973 (1974 models).¹¹⁴

At NHTSA-conducted public meetings in 1969 and 1970, General Motors, among others, shared its dramatic achievements in air bag technology. General Motors then promised to have *optional* air bags available by 1973, but argued that NHTSA should postpone a *mandatory* passive restraint standard until the 1975 model year.¹¹⁵

In 1971, all of the major domestic and foreign auto manufacturers, except General Motors and Mercedes, joined in a law suit challenging NHTSA's issuance of its final passive restraint rule, including the rule's effective date of August 15, 1973.¹¹⁶ While the court upheld NHTSA's authority to issue a passive restraint standard and while it held further that the standard was a reasonable exercise of the agency's discretion, it nonetheless held that the standard should be delayed

¹¹¹ Opinion Research Corporation, *Passive v. Active Belt Systems in Volkswagen Rabbits: A Comparison of Owner use Habits and Attitudes*. Prepared for NHTSA on contract: May, 1976. VW puts the usage rate at 90 percent. See *infra*, note 112.

¹¹² Volkswagen Statement delivered at Department of Transportation on Occupant Restraint Systems and Standards, Aug. 3, 1976, p. 4.

¹¹³ 34 Fed. Reg. 11148 (July 2, 1969).

¹¹⁴ These changes were effected in the following notices:

(a) 35 Fed. Reg. 7187 (Issued June 5, 1970). Introduced "passive restraints," delayed effective date until January 1, 1973.

(b) 35 Fed. Reg. 16972 (Issued October 29, 1970), delayed effective date until July 1, 1973.

(c) 36 Fed. Reg. 4600 (Issued March 3, 1971), delayed effective date until August 15, 1973.

¹¹⁵ General Motors stated in its written comments:

"For the 1974 model year, the air cushion would be made standard equipment on those 1973 models on which it was an optional item while extending the customer option to several additional models of General Motors passenger cars. We estimate approximately one million 1974 model General Motors cars could be equipped with the air cushion in this second year. In the fall of 1974, the air cushion would be made standard equipment on all 1975 General Motors passenger cars, most light trucks (under 6,000 lbs. GVW) and certain multipurpose passenger vehicles." (General Motors Corporation comments to NHTSA on Docket No. 69-7, Notice No. 4, August 3, 1970.)

¹¹⁶ The suit challenged NHTSA's Occupant Crash Protection Notice 9, issued March 3, 1971 (36 Fed. Reg. 4600).

until the agency developed a definitive test which manufacturers could use to determine reliably whether their particular passive restraint system would meet NHTSA's standard.¹¹⁷

Meantime, NHTSA had issued an amendment postponing the effective date for mandatory passive restraints to September 1, 1975 (1976 models).¹¹⁸ Passive restraints including air bags would be permitted as an option on 1974 and 1975 models. However, an additional option, the ignition interlock system,¹¹⁹ would also be expressly permitted for the same model years. This amendment went into effect¹²⁰ and, not surprisingly, all manufacturers opted for the less expensive ignition interlock system. Subsequent to the passive restraint court decision, announced in December 1972, NHTSA succeeded in developing a test for manufacturers to use in determining whether they comply with the standard. The test, based on an improved life-like dummy, was designed to meet the objections of the court to the passive restraint standard. However, NHTSA has not moved to reissue the passive restraint standard, despite declarations of two NHTSA Administrators (serving from 1972-1975) that publishing a passive restraint standard was their highest priority.

(a) Invasion No. 1: The White House and the ignition interlock episode

NHTSA's decision to offer the ignition interlock option for 1974 and 1975 models, which in effect mandated the use of the interlock since passive protection was the only other option, was the direct result of the first of three major political invasions of NHTSA's passive restraint rulemaking proceeding from official sources outside the agency. This first invasion was by far the boldest. The ignition interlock system was initially proposed in 1970 by the Ford Motor Company. From the beginning it was posed as an alternative to passive restraints and in particular to air bags. Ford Motor Company launched a national advertising campaign in both print and electronic media to extol the virtues of the ignition interlock option.

In 1971, Henry Ford II made a personal visit to the White House complaining that the cumulative effect of Federal regulations on his company, alleging that proposed emissions and safety regulations, would soon double the cost of the Ford Pinto and would require comparable increases on other models.¹²¹ Soon after, the White House took a direct interest in NHTSA's passive restraint rulemaking. A series of high level briefings and exchanges of views took place between NHTSA, DOT, and White House Officials. Then Secretary of Transportation, John Volpe, a firm advocate of the passive restraint pro-

¹¹⁷ *Chrysler Corporation v. Department of Transportation*, 472 F. 2d 659 (6th Cir. 1972). Oral arguments took place on April 20, 1972. The decision was announced on December 5.

¹¹⁸ Issued September 29, 1971, (36 Fed. Reg. 19254).

¹¹⁹ The interlock was first proposed on September 29, 1971, (36 Fed. Reg. 19266).

¹²⁰ Interlock rule issued January 17, 1972 (37 Fed. Reg. 3911), with an effective date of August 15, 1973.

¹²¹ Informed accounts include the then President of the Chrysler Corporation, Lynn Townsend, in this meeting. See statement of Subcommittee Chairman Moss describing this meeting in the floor debate on the ignition interlock standard of the House:

"The interlock was brought about over the objections of the Department of Transportation as a result of the visit of the presidents of two of the major manufacturers of automobiles with the President of the United States, and at a subsequent meeting attended by Mr. John Ehrlichman, Mr. Peter Flanigan, and another White House aide, the order was issued to the Department of Transportation to go along with the interlock rather than the alternative system which the Department of Transportation had under study as an intermediate device."

120 Cong. Rec. H8136 (August 12, 1974). See also *Hearings, supra*, note 18, at p. 467.

posal, was reported to have returned despondently from sessions with White House officials who rejected his efforts to defend the proposal. Eventually, in a White House confidential memorandum to DOT, Presidential aides John Ehrlichman and Peter Flanigan ordered both a delay in passive restraints and a requirement for the ignition interlock. NHTSA duly complied. A law suit brought by Ralph Nader and the Center for Auto Safety challenged the decision on the ground that it was based on improper *ex parte* communications from unidentified sources not included in the official rulemaking docket.¹²² The suit failed to produce the notorious memorandum, although a number of NHTSA officials confirm that it was received.¹²³

While the ignition interlock system did succeed in dramatically increasing use of seatbelts,¹²⁴ practical problems made it the butt of widespread opposition. A Congressional movement against the system led by former Rep. Louis Wyman of New Hampshire eventually resulted in its repeal by Congress in 1974 (P.L. 93-492, § 125.)¹²⁵

(b) Invasion No. 2: Congressional involvement in passive restraint rulemaking

The same provision of Public Law 93-492 (§ 125) also requires NHTSA to give Congress a 60-day period in which to veto any final passive restraint rule. Although a move in Congress to prevent NHTSA from forever issuing a passive restraint standard failed, the message was clear. Some in Congress were uncomfortable about leaving in the hand of NHTSA full discretion to issue a passive restraint standard.

Since this second intervention in NHTSA's passive restraint program, the agency has made little progress toward issuance of a standard, despite continuing hard work by NHTSA officials to that end. A week of public hearings, conducted by NHTSA in May 1975, only emphasized the breach between advocates and opponents of the system.

DOT has extended the current belt option requirements through the 1977 model year.¹²⁶ Secretary of Transportation Coleman has recently issue a set of proposals for restraint systems, including mandatory passive restraints.¹²⁷ By law, the Department must hold a public meeting on any proposal for a restraint system before it can be issued as a rule. Such a meeting was held on August 3, 1976. The Secretary now has the ultimate decision under advisement. If the Secretary decides that the final rule will involve any change from the current restraint system requirement, the rule must be submitted to the Congress to meet the legally required 60-day period for reviewing and possibly vetoing the decision.

¹²² *Nader v. Volpe* 466 F. 2d 261 (D.C. Cir. 1972).

¹²³ One former NHTSA official, described to the Subcommittee the memorandum in detail as he had seen it but has asked not to be identified. The memo is credited to Peter Flanigan in an account of an interview of former NHTSA Administrator Douglas Toms conducted by Ralph Nader on January 5, 1976. The account is included in the Subcommittee's hearings on NHTSA. (see *supra*, note 18, p. 438).

¹²⁴ Data on the safety benefits of the interlock are summarized in the prepared statement of Dr. James B. Gregory, former NHTSA Administrator, reprinted in the Subcommittee's 1976 Regulatory Reform Hearings, *supra*, note 18, p. 418.

"The fact is that the interlock was largely a safety success. People buckled up in increasing numbers beginning with the 1974 models which contained this 'ultimate reminder.' Even as all the unhappy shouts against the interlock finally abated we were seeing over twice the average lap belt wearing in these cars and upwards of 8 times the normal shoulder belt usage. Lives were indeed being saved and injuries were indeed being reduced among about 10 percent of the total car occupant population by the fall of 1974."

¹²⁵ 15 U.S.C. 1410 b.

¹²⁶ Initial Proposal: 41 Fed. Reg. 24077 (June 14, 1976) Reproposed 41 Fed. Reg. 29715 (July 19, 1976), Final Rule: 41 Fed. Reg. 36494 (Aug. 30, 1976).

¹²⁷ 41 Fed. Reg. 24070-24079 (June 14, 1976).

(c) Invasion No. 3: Intervention of the Secretary of Transportation in passive restraint rulemaking

Until March 1976, passive restraint rulemaking was ultimately the decision of the Administrator of NHTSA, though it has always been generally accepted that a rule of wide importance would require concurrence by appropriate officials, including the Secretary of Transportation. On March 9, at the National Press Club, Secretary of Transportation Coleman gave the first hint of his intention to recapture responsibility for passive restraint rulemaking previously delegated to NHTSA.¹²⁸ In a formal announcement on June 9, 1976 appearing in the *Federal Register* on June 14, 1976, the Secretary took charge by issuing five specific proposed options and identifying issues for participants to address. The Secretary stated:

The prospect of mandating passive restraints of automobiles has become increasingly controversial. Questions of effectiveness, cost, and suspected hazards, as well as philosophical problems of restricting individuals' freedom of choice in regard to how much they pay for safety protection, have been raised by opponents of the air bag. It is in the context of this controversy that I must make this decision as to the future of passive restraints.¹²⁹

Thus the Secretary ruled NHTSA out of future responsibility for the passive restraint decision. Although this assumption of authority apparently does not conflict with the letter of the law,¹³⁰ it reduces the influence of technical expertise and enhances the influence of political and economic interests. The Secretary is well aware of the political constraints of his own position. In reaching his decision, the Secretary must wear two hats, that of a rulemaker delegated his function by the Congress and that of a member of the President's cabinet who serves at the pleasure of the President.

It remains to be seen whether the information and analysis developed in the rulemaking process on the one hand, or political considerations on the other, will dominate the Secretary's decision. What is clear is that the rulemaking process itself has suffered its third wave of political intervention from outside NHTSA, the agency responsible for the rulemaking and for vehicle safety.

3. Conclusion

For the last 4 years, NHTSA has focused a major portion of its energies on the passive restraint standard. Successive interventions into this rulemaking effort, first by the White House, then by the Congress, and finally by the Secretary of Transportation, have served to remove final authority from NHTSA altogether. It is difficult to see in this history a failure of nerve or integrity on the part of NHTSA, which has consistently sought to issue the standard. Rather, it is an instance of the success of regulated industry in organizing enough opposition

¹²⁸ The transcript of the question-and-answer on air bags reads:

Question. Bill, I'm sure this next question is not directed at you personally. It's on airbags. When will we have an end to windbags and a decision on airbags?

Mr. COLEMAN. We—I have on my desk now—and you learn the language, you tell them don't send you up a recommendation; send up an option paper. I have an option paper, and we are—we are taking a look at it. Don't hold me to it, but I hope I can reach a decision within 90 days . . . Transcript at p. 14-15.

¹²⁹ 41 Fed. Reg. 24070.

¹³⁰ The National Traffic and Motor Vehicle Safety Act of 1966 vested rulemaking authority in the Secretary of Commerce, 15 U.S.C. 1392(a) and 15 U.S.C. 1391(10). With the creation of the Department of Transportation later in 1966 (49 U.S.C. 1651 *et seq.*) the functions were then assigned to the Secretary of Transportation (49 U.S.C. 1655(a)(6) (A)). The Secretary of Transportation has in turn delegated this authority to the NHTSA Administrator, 49 C.F.R. Section 501.2(a). It is the position of the current Secretary that he may reassume this authority without formal action.

to a NHTSA proposal to stop the agency dead in its tracks. On its face, NHTSA's inability to issue the standard is a defeat of its rule-making authority. It may be inevitable that when as much controversy is generated as surrounds the air bag decision, the Secretary of Transportation or to the Congress will seek to re-assume control of the decision. The consequence, however, is that NHTSA is left unable to pursue the mandate assigned to it by Congress. The regulatory structure would, in this case, be spared the appearance of repeated failure and public criticism, if, at a minimum, the law were amended to make the groundrules clear. However, the Subcommittee concludes, it would be far better to restructure NHTSA's vehicle safety function to improve NHTSA's ability to carry out its assigned mandate without undue interference.

IV. Conclusions and Recommendations

1. NHTSA's program of Federal motor vehicle safety standards has contributed substantially to reducing the toll of highway fatalities and injuries. However, the program has slowed to a virtual halt over the past 2 years. NHTSA's highest priority, the passive restraint standard, is yet to be concluded. The Secretary of Transportation recently assumed responsibility for the decision, with the prospect that, for political considerations, the decision may not be in accord with the criteria of the 1966 Vehicle Safety Act.

In short, NHTSA's ability to respond to its safety mandate has been limited tightly by the agency's status in a Federal executive bureaucracy which includes the Secretary of Transportation, the Council on Wage and Price Stability, the Office of Management and Budget, and the White House.

Recommendation

The major regulatory program of the National Highway and Safety Administration should be extracted from the Department of Transportation and combined with those of the Food and Drug Administration and the Consumer Product Safety Commission and a new Consumer Safety Health Commission, established as an independent regulatory agency. Such an arrangement would increase the independence of NHTSA's regulatory function by insulating it from improper political interference. This is not to suggest a reduction in NHTSA's accountability to the public nor that NHTSA should be relieved of the need to face trade-offs with other objectives, such as fuel economy and emissions. It is only to assert that if new limits are to be imposed on NHTSA's safety mission as defined by the Congress, these limits should be established by the Congress, by means of statutory reform, not by dictates of the executive branch. Independence from special interests exerted through executive branch offices and responsiveness to the law will be increased by combining NHTSA's safety functions with those of other safety agencies into a single Consumer Safety and Health Commission. The merger also would reduce duplication and overlapping of regulatory functions and procedures.

2. NHTSA's efforts to produce economic impact studies and benefit/cost analyses of proposed rulemaking are not required by its governing statutes. As these studies are based on inadequate data, they

contribute little to NHTSA rulemaking at present, except fuel for controversy. Such studies are required by an Executive Order, an OMB Circular, by the demand of the Council on Wage and Price Stability, and by the rules of the Department of Transportation. None of these carry the force of law. The Congress addressed this issue in 1966 and determined not to make benefit/cost analysis a prerequisite to vehicle safety rules.

Improving the quality of benefit/cost analysis and improving its value to the NHTSA Administrator depend on major improvements in NHTSA's ability to organize, gather, and interpret automobile crash data. When this ability is sufficient it may be appropriate to require that the NHTSA Administrator consider benefit/cost or cost/effectiveness measures in determining whether to proceed with rule-making.

Recommendation

Until benefit/cost studies can be based on acceptable data, NHTSA should accord little or no weight to them in agency rulemaking. At the same time, NHTSA should press—with even more intensity than it has in the past—its efforts to develop a data base which will make reasonable, adequate benefit/cost studies possible. Before this is accomplished, the Department of Transportation, the Council on Wage and Price Stability, and others should be held to the limits of statutory law and prevented from imposing unreasonable requirements on NHTSA.

If and when an adequate data system is put into operation Congress may wish to reassess its position on benefit/cost studies in NHTSA rulemaking.

3. NHTSA has yet to develop a workable system for evaluating existing standards. This shortcoming is a reflection of the weaknesses in NHTSA's current data base. Yet, such a system is essential for determining whether each of the existing 50 standards is effective.

Recommendation

NHTSA should develop a system for evaluating the effectiveness of existing standards as quickly as possible, and should proceed to eliminate any found conclusively to be ineffective.

4. NHTSA's increasing time lag in completing defect investigations is unconscionable.

Recommendation

NHTSA should eliminate the excessive delays in bringing defect investigations to a close. No investigation should be permitted to remain open for more than 2 years, and all but the most complex should be brought to a conclusion within 1 year, to afford adequate public safety.

5. NHTSA's rulemaking stagnation does not comport with the letter or the spirit of the Vehicle Safety Act.

Recommendation

NHTSA should proceed to issue long-promised new standards, and upgrade existing standards where appropriate, without further unnecessary delay.



FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 6

CONSUMER PRODUCT SAFETY COMMISSION

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CHAPTER 6

CONSUMER PRODUCT SAFETY COMMISSION

I. Summary

Created on October 27, 1972,¹ the Consumer Product Safety Commission is the youngest of the nine agencies discussed in this Report.² The act which created the Commission, the Consumer Product Safety Act, establishes a broad and substantial Federal presence in fields formerly subject only to limited regulation, if any. It was described by the Chairman of the Administrative Conference of the United States as "the first legislation since the days of the New Deal to create an independent commission for the purpose of imposing federal regulation on an established area of commercial activity."³ Although the impact on vendors and producers is not ignored, the legislation manifests a clear intent that consumers be protected from unsafe products. To this end, the Commission has been delegated substantial powers to move swiftly and effectively against hazards in a broad variety of goods not otherwise regulated by Federal authorities.

The importance of this legislation lies not merely with its coverage of a pervasive field of commercial activity for the first time. Of equal importance is the innovative method of regulation it employs. At the time of its enactment, the Consumer Product Safety Act represented in many respects the most advanced congressional thinking on the techniques of Federal regulation. The Act incorporated a number of concepts of regulatory reform. Indeed, many current proposals for regulatory reform appear to be its progeny.

The Commission's broad regulatory powers have yet to be utilized to the full. The Commission has been slow to develop product safety standards. It has barely tapped the potential usefulness of a program to inform the public about prevalent risks. Some of its most effective powers have never been employed. The Commission after 3 years has yet to demonstrate its capacity to plan, to prescribe administrative rules and guidelines, and to set clear priorities. Its issuance of a swimming pool slide standard as the first product safety standard under the Consumer Product Safety Act is unjustified and inexcusable.

Although the Commission has not achieved conspicuous success as a regulator, it has taken bold initiatives in regulatory procedures. It is the most open of all the Federal regulatory agencies. It has provided

¹ P.L. 92-573, 15 U.S.C. 2051 *et seq.* The Commission became operational on May 14, 1973.

² The subcommittee's regulatory reform-oversight hearings on the Consumer Product Safety Commission are printed in *Hearings on Regulatory Reform Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce*, 94th Cong., 2d Sess., vol. IV (1976) [hereinafter cited as *Hearings*] Serial No. 94-83.

³ Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. Rev. 899 (1973) (footnote omitted).

in some instances for reasonably effective consumer participation, on occasion funding consumer representatives in the standards development process. Unfortunately, its policy of limited funding of consumers has resulted in inadequate consumer participation.

The Subcommittee recommends that the Commission reexamine its policy in the standards development process with a view to assuring vigorous and effective consumer participation. The Commission must proceed promptly to the difficult task of articulating and applying its policy for planning and setting specific priorities. Its openness policy, although generally sound, should be revised somewhat so as not to allow disclosure of internal legal memoranda. The Commission should promptly issue rules or guidelines for decisions on environmental assessments, on record keeping, the granting of hearings, use of the imminent hazard power, and the handling of citizen petitions. The Commission should impress upon manufacturers the importance of their obligation to report any substantial hazard in the distribution and use of their product. The Commission should develop an effective program for alerting the public to comparative safety of competitive products and creating public awareness of safe practices with due regard for lessons learned from past experience with information campaigns. The Commission should have full responsibility to litigate civil actions.

For its part, the Congress should support the Commission in its efforts to maintain its independence of pressures from narrowly partisan or self-centered economic interests.

II. Mandate

A. HISTORICAL BACKGROUND

Prior to the mid-1960's, the Federal government had not dealt in any comprehensive way with the safety of products destined for the ultimate consumer. Rather, Federal regulatory efforts had been piecemeal, dealing, often in response to a dramatic tragedy, with isolated items.⁴ Beginning in 1953, with the Flammable Fabrics Act,⁵ the first significant Federal regulation affecting the safety of products other than water, food and drugs, Congress had enacted numerous laws, each dealing in a different way with a different type of product hazard, an approach whose futility was perhaps best illustrated by the two-page Refrigerator Safety Act.⁶ By 1967, a Senate committee could accurately conclude:

The historic pattern of national safety legislation in the United States has been largely characterized by reaction to tragedy—specific, preventable tragedy.⁷

Recognizing the need for a more comprehensive approach to the product safety problem, Congress in that year established the National Commission on Product Safety (NCPS).⁸ The Senate Committee

⁴ See, e.g., 118 Cong. Rec. 31375 (1972) (remarks of Rep. Staggers); National Commission on Product Safety, *Final Report Presented to the President and Congress* 2 (1970).

⁵ Act of June 30, 1953, 67 Stat. 111, codified at 15 U.S.C. 1191-1204.

⁶ Act of Aug. 2, 1956, 70 Stat. 953, codified at 15 U.S.C. 1211-14. Other enactments during the period when Congress sought to employ the piecemeal approach include the Federal Hazardous Substances Act (formerly the Hazardous Products Labeling Act), 15 U.S.C. 1261-73; the Child Protection and Toy Safety Act (incorporated into the Hazardous Substances Act), 15 U.S.C. 1261-73; and the Poison Prevention Packaging Act, 15 U.S.C. 1471-76.

⁷ S. Rept. No. 225, 90th Cong., 1st Sess. 1 (1967) (Report accompanying resolution establishing National Commission on Product Safety).

⁸ Joint Resolution of Nov. 20, 1967, P.L. 90-146, 81 Stat. 466.

which reported the Joint Resolution establishing the Commission noted the inadequacy of both the current knowledge about product safety and the degree of understanding of the means for dealing with the hazards:

The Committee is well satisfied that unsafe products are being marketed in disturbing numbers but there exists today no definitive study of the extent to which these hazards constitute a major public health problem.

Similarly, the Committee was presented with sufficient evidence to raise grave questions as to the adequacy of the measures presently employed to insure the reasonable safe design and construction of the products sold to the American family. There has never been a significant effort to examine the workings and interrelationships of the present systems of voluntary self-regulation, common law product liability, State and Federal regulatory legislation, and municipal ordinance.*

Consequently, Congress directed the NCPS to "conduct a comprehensive study and investigation of the scope and adequacy of measures now employed to protect consumers against unreasonable risks of injuries which may be caused by hazardous household products."¹⁰ The NCPS was to identify categories of household products presenting an unreasonable hazard to the health and safety of the consuming public, evaluate the effectiveness of industry self-regulation in providing protection, and review the existing Federal, State, and local law pertaining to consumer product safety.

Two years later, the Commission reported to Congress that product safety did constitute a public health problem of sizable dimensions: 20 million injuries a year and 30,000 fatalities. In addition, the Commission estimated the annual costs of product-related injuries to be in the neighborhood of \$5.5 billion dollars. It concluded:

The exposure of consumers to unreasonable consumer product hazards is excessive by any standard of measurement.¹¹

The governmental response to this challenge was found to have been negligible. State and local law was characterized as a "hodgepodge of tragedy-inspired responses to challenges that cannot be met by restricted geographical entities."¹² Federal authority to curb hazards, said the NCPS, was "virtually nonexistent." Where authority did exist, it was often dispersed among various agencies or hampered by "unnecessary procedural obstacles, circumscribed investigative powers, inadequate and ill-fitting sanctions, bureaucratic lassitude, timid administration, bargain-basement budgets, distorted priorities, and misdirected technical resources."¹³

Despite weaknesses in existing programs the Commission concluded that experience with those few which had sufficient authority had clearly demonstrated that a Federal regulatory role could substantially upgrade the safety of consumer products.

A major drawback was the lack of information needed for sound regulation; the Commission found that, even after its own 2-year study, data on the number and nature of injuries from consumer products were "far from satisfactory."¹⁴

* *Id.* at 2.

¹⁰ Section 2(a), P.L. 90-146 § 2(a).

¹¹ National Commission on Product Safety, *Final Report to the President and Congress* 1 (June 1970).

¹² *Id.* at 2.

¹³ *Id.*

¹⁴ *Id.*

The NCPS offered three general recommendations. First, an independent Federal regulatory agency should be established. Second, the staff of that agency should include a Consumer Safety Advocate appointed by the President to serve as the consumer's spokesman before the agency. Third, the new agency should have extensive authority to promulgate mandatory safety standards. The NCPS report included a draft of legislation recommended to achieve these three goals.

B. THE CONSUMER PRODUCT SAFETY COMMISSION (CPSC)

Congress responded quickly to the NCPS report. Several bills to establish a new independent agency with responsibility for consumer product safety were introduced in June of 1970, the same month that the NCPS report was submitted. Although that Congress took no final action, the Consumer Product Safety Act was enacted by the next Congress late in the second session.¹⁵ With notable exceptions,¹⁶ the Act was patterned after the legislation which the National Commission on Product Safety had recommended.¹⁷ It established an independent Consumer Product Safety Commission with "comprehensive authority to take action across the full range of consumer products to reduce or prevent product-related injuries."¹⁸ The legislation created a significant new role for Federal regulation:

This legislation proposes that the Federal Government assume a major role in protecting the consumers from unreasonable risks of death, injury, or serious or frequent illness associated with the use or exposure to consumer products.¹⁹

¹⁵ Act of Oct. 27, 1972, P.L. 82-573, 86 Stat. 1207.

¹⁶ The principal difference between the Consumer Product Safety Act and the bill proposed by the National Commission on Product Safety is the omission from the former of a Consumer Safety Advocate. Section 4 of the NCPS bill provided that the proposed Commission have an independent safety advocate appointed by the President (rather than the Commission) to a term of 7 years. The Advocate would have had authority to participate in all agency proceedings, either in response to complaints from the public, Congress, and the executive agencies, or on its own motion. He also would have been empowered to seek judicial review of Commission decisions. Although this provision was considered by both the House and Senate Committees, it did not appear in either of the bills which were reported to the floor, apparently because of the legislation proposing to establish a separate consumer advocacy agency then being considered. See Senate Report No. 749, 92d Cong., 2d sess. 19 (1972); Cong. Rec. 31379 (1972) (remarks of Rep. Eckhardt); Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.L. Rev. 889, 902, n. 20 (1973).

¹⁷ The basic concept of the NCPS Consumer Safety Advocate was subsequently incorporated in the Railroad Revitalization and Regulatory Reform Act of 1976, which amended the Interstate Commerce Act, establishing, *inter alia* an independent Office of Rail Public Counsel headed by a Presidential appointee, 49 U.S.C. 27, as amended by Act of Feb. 5, 1975, P.L. 94-210, 90 Stat. 51.)

A somewhat less important difference in the two statutes is their assessment of the consumer interest to be protected. The NCPS bill would have made a legislative finding that the public had a "right to be protected" against unreasonably hazardous products. Section 2(a)(1). Although the Senate bill contained a similar finding, S. 3419, 92d Cong., 2d Sess., § 101(7), Cong. Rec. 21833 (1972), the legislation eventually adopted merely finds that "the public should be protected" against unreasonable product hazards. Section 2(a)(3), 15 U.S.C. 2051(a)(3). The report accompanying the House bill, which contained the finding included in Section 2(a)(3) of the legislation as passed, stated: "It is considered self-evident that the public is entitled to purchase products without subjecting themselves to unreasonable risk of injury or death." H.R. Rep. No. 1153, 92d Cong., 2d Sess. 21 (1972).

¹⁷ The bill as passed was essentially the House bill. H.R. 15003, 92d Cong., 2d sess. (1972). The Senate bill, which the Conference reflected in virtually all important respects, had been somewhat more ambitious. S. 3419, 92d Cong., 2d sess. (1972). It would have removed from the Department of Health, Education and Welfare the functions of the Food and Drug Administration and transferred them to a newly established independent Food, Drug, and Consumer Product Agency headed by a single administrator. The Administration bill added responsibility for consumer product safety to the mandate of the FDA while retaining FDA within HEW as an executive agency. S. 1797, 92d Cong., 1st sess. (1971); H.R. 8157, 92d Cong., 1st sess. (1971). In rejecting this approach the House report indicated both a lack of confidence in the Food and Drug Administration and a feeling that FDA already had responsibilities so broad that it would be unable to accord product safety regulation the important status the Committee believed was appropriate. H.R. Rep. No. 1153, 92d Cong., 2d sess. 25-26 (1972).

¹⁸ H.R. Rep. No. 1153, 92d Cong., 2d sess. 21 (1972).

¹⁹ *Id.*

1. *Powers and responsibilities.*—Relying heavily on the findings of the National Commission on Product Safety which it had created 3 years earlier,²⁰ Congress gave the new agency two basic functions: the regulation of consumer product safety, a task which the market alone had proven unable to perform; and the collection and dissemination to the public of information about product safety. As stated in the Consumer Product Safety Act, the legislation's purposes are:

(1) to protect the public against unreasonable risks of injury associated with consumer products;

(2) to assist consumers in evaluating the comparative safety of consumer products;

(3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and

(4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.²¹

The Act directs the Consumer Product Safety Commission to regulate "consumer products," a term which is broadly defined,²² and provides it with a broad array of effective regulatory weapons from which to choose. The Commission may set mandatory safety standards, including requirements for design and construction as well as performance, for consumer products which are determined to present an "unreasonable risk of injury."²³ If the Commission finds that it is not feasible to protect the public adequately from the unreasonable risk of injury by means of a mandatory product safety standard, it may ban the product.²⁴

If the Commission finds that a consumer product presents a "substantial product hazard," defined to mean either a product which fails to comply with an applicable consumer product safety rule or a product which creates a "substantial risk of injury to the public,"²⁵ the Commission has available a variety of remedies to protect the public. It may require the manufacturer, distributor, or retailer to undertake such notification to consumers as it deems appropriate,²⁶ and it may further require the manufacturer, distributor, or retailer of the product to choose among repair, replacement, or refund.²⁷ The Commission is not left solely to its own devices to ferret out these substantial product hazards: a unique provision in the Act requires manufacturers, distributors, and retailers to notify the Commission immediately upon obtaining information reasonably supporting the conclusion that a product contains a defect which could create a substantial product hazard.²⁸

²⁰ See *id.* at 21-24; S. Rep. 749, 92d Cong., 2d Sess. 3-5 (1972).

²¹ Section 2(b), 15 U.S.C. 2051(b).

²² Section 3(a)(1), 15 U.S.C. 2052(a)(1); see H. Rep. No. 1153, 92d Cong., 1st sess. 27-28 (1972). The definition specifically excludes a number of major products, such as motor vehicles, tobacco, food, and drugs. See *id.*

²³ Section 7, 15 U.S.C. 2056. The statute requires, however, that performance standards be used "whenever feasible." Section 7(a), 15 U.S.C. 2056(a); see H. Rep. No. 1153, 92d Cong., 1st sess. 33 (1972) ("strong preference for performance standards").

²⁴ Section 8, 15 U.S.C. 2057.

²⁵ Section 15(a), 15 U.S.C. 2064(a).

²⁶ Section 15(c), 15 U.S.C. 2064(c). A provision added by the Consumer Product Safety Commission Improvements Act of 1976 empowers the Commission to initiate judicial proceedings to enjoin the distribution of a consumer product during the pendency of a section 15 proceeding. 15 U.S.C. 2064(g), added by P.L. 94-284, § 12.

²⁷ Section 15(d), 15 U.S.C. 2064(d). Because the Act defines a "manufacturer" as any person who "manufactures or imports" a consumer product, section 3(a)(4), 15 U.S.C. 2052(a)(4), in every instance where it is made applicable to a "manufacturer," it also applies to importers.

²⁸ Section 15(b), 15 U.S.C. 2064(b). A product which fails to comply with a consumer product safety rule is *per se* a substantial product hazard.

If the Commission determines that a product is an "imminently hazardous consumer product,"²⁹ it may immediately institute judicial proceedings against it or its manufacturer, distributor, or retailer for appropriate relief, including public notification recall, repair, replacement, or refund.³⁰

In addition, the Commission administers several other acts which were transferred to it from other agencies by the Consumer Product Safety Act: the Federal Hazardous Substances Act,³¹ the Flammable Fabrics Act,³² the Poison Prevention Packaging Act,³³ and the Refrigerator Safety Act.³⁴ These laws provide the Commission with a variety of regulatory devices for use in proceedings pertaining to the products falling within their respective jurisdictions.³⁵ Perhaps most noteworthy of these is the authority granted by the Child Protection and Toy Safety Act provisions of the Federal Hazardous Substances Act to act quickly and efficiently against hazards in children's toys with the simple notice and comment rulemaking procedures described by the Administrative Procedure Act.³⁶

In addition to its regulatory responsibilities, the Commission also has been given the task of assembling information on consumer product safety and disseminating it to the public. This dual research and educational function is mandated under Section 5 of the Act, which directs the Commission to maintain an Injury Information Clearing House, to collect and disseminate product injury data, and to conduct such research and studies as the Commission deems appropriate.³⁷

²⁹ For a discussion of the Congressional intent embodied in the similar term of art "imminent hazard," see *Hearings on Regulatory Reform (Food and Drug Administration) Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d sess., vol. II, Serial No. 94-81, at 531-32, 551-52, 574-76, 590-601 (1976) (Federal Food, Drug, and Cosmetic Act); *Hearings on the Effects of 2, 4, 5-T and Related Herbicides on Man and the Environment Before the Subcomm. on Energy, Natural Resources, and the Environment of the Senate Comm. on Commerce*, 91st Cong., 2d sess., serial No. 91-83, at 50-52, 69-70, 74-77 (1976) (Federal Insecticide, Fungicide, and Rodenticide Act).

³⁰ Section 12, 15 U.S.C. 2061. The Commission also has imminent hazard powers under the Federal Hazardous Substances Act. That Act authorizes the Commission to make an administrative determination that a product is an "imminent hazard." Sections 2(q)(2), 3(e)(2), 15 U.S.C. 1261(q)(2), 1262(e)(2). The latter provision is contained in the Child Protection and Toy Safety Act. Because no judicial proceedings are required, these provisions enable the Commission to move considerably more expeditiously than does Section 12 of the CPSA.

³¹ 15 U.S.C. 1261-1274.

³² 15 U.S.C. 1191-1200.

³³ 15 U.S.C. 1471-1476.

³⁴ 15 U.S.C. 1211-1214.

³⁵ Section 30(d) of the CPSA originally provided that, if the risk of injury sought to be addressed "could be eliminated or reduced to a sufficient extent by action taken under" one of the transferred acts, then the Commission was required to use the appropriate transferred act rather than the CPSA. 15 U.S.C. 2079(d). The Consumer Product Safety Commission Improvements Act of 1976 increased the Commission's flexibility by amending this provision to authorize the Commission to address such risks of injury under the CPSA if it finds by rule that "it is in the public interest to regulate such risk of injury under this Act." 15 U.S.C. 2079(d), as amended by P.L. 94-284, § 16.

³⁶ 5 U.S.C. 553. The provision of the Child Protection and Toy Safety Act referred to is Section 3(e)(1) of the Federal Hazardous Substances Act, 15 U.S.C. 1262(e)(1). The National Commission on Product Safety found that "[i]n most instances relating to the development of safety standards of general applicability, informal procedures appear appropriate." National Commission on Product Safety, *Final Report Presented to the President and Congress* 93 (1970). Although Congress approved informal procedures in the standard-setting provisions of the CPSA (which differ from the provisions of the Administrative Procedure Act only in that they require participants in the proceeding to be given an opportunity for oral presentation of views, Section 9(a)(2), 15 U.S.C. 2058(a)(2)), it left unchanged the more cumbersome procedures contained in section 2 of the Federal Hazardous Substances Act, 15 U.S.C. 1261(q)(1)(B), procedures which have been roundly criticized. See, e.g., *Hearings* at 41-42 (testimony of Commissioner Little); *id.* at 90 (testimony of Chairman Simpson); *id.* at 138 (testimony of Commissioner Franklin). The standard-setting provisions contained in the Flammable Fabrics Act are similar to those in the CPSA. Section 4(d), 15 U.S.C. 1192(d), as amended by Public Law 94-284 (Consumer Product Safety Commission Improvements Act of 1976). The Poison Prevention Packaging Act requires only notice and comment rulemaking for standard-setting. Section 3, 15 U.S.C. 1472.

³⁷ 15 U.S.C. 2054.

Despite the considerable powers Congress gave the Commission to move against hazardous consumer products, the legislation is not biased against business.³⁸ The Chairman of the House Subcommittee on Commerce and Finance, which reported the legislation, stated:

The Subcommittee and the Committee were especially careful to design the act to take into account the legitimate problems of industry. Rarely have I seen legislation drafted with more awareness of its effect on the industries that will be subject to it.³⁹

Congress incorporated in the Act provisions which insure that Commission regulations do not unduly burden business.⁴⁰ The Act's broad preemption authority enables the Commission to eliminate compliance problems frequently afflicting business subject to regulation by a multiplicity of State and local agencies. The Act requires the Commission to provide an opportunity for a trial-type hearing before issuing a Section 15 substantial product hazard order.⁴¹ A provision added by the Consumer Product Safety Commission Improvements Act of 1976, authorizes suits against the Commission to recover damages incurred as a result of Commission actions which are grossly negligent.⁴²

2. Regulatory reform aspects of the Consumer Product Safety Act.—In establishing this new regulatory agency, Congress attempted to create a legislative scheme which would overcome a number of the shortcomings apparent in the workings of older regulatory agencies. In effect, the Consumer Product Safety Act was regulatory reform whereby Congress employed a number of new techniques believed likely to improve the effectiveness, the efficiency, and the fairness of government regulation.⁴³

(a) *Consumer participation.*—Perhaps most important of the regulatory reform concepts embodied in the Act is the emphasis on con-

³⁸ See, e.g., 118 Cong. Rec. 21852 (1972) (remarks of Senators Pastore, Percy, and Magnuson); 118 Cong. Rec. 31375 (1972) (remarks of Rep. Staggers). In fact, Congress hoped that business and consumers would attack the product safety problem in a spirit of cooperation. The Chairman of the Senate Commerce Committee, in reporting the bill, stated that it "would usher in a new era in product safety—an era in which Government, industry, and the consumer would work together. . . ." 118 Cong. Rec. 21846 (1972) (remarks of Senator Magnuson).

³⁹ Cong. Rec. 31378 (1972) (remarks of Rep. Moss). The House Report recognized "a need to insure that the procedures relating to consumer products are fair to both industry and consumers." H. Rep. No. 1153, 92d Cong., 2d sess. 26 (1972); see 118 Cong. Rec. 31381 (1972) (remarks of Rep. James T. Broyhill).

⁴⁰ In promulgating consumer product safety rules, the Commission must make detailed findings as to the economic effect of the rule, including means of "minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices * * *." Section 9(c), 15 U.S.C. 2058(c); see H. Rep. No. 1022, 94th Cong., 2d sess. 30 (1976). The House Report indicated an expectation that the Commission, when establishing requirements for manufacturers' recordkeeping under Section 16(b), 15 U.S.C. 2065(b), "will take due consideration of the cost of establishing and maintaining the records and benefits to be achieved." H.R. Rep. No. 1153, 92d Cong., 2d sess. 44 (1972).

⁴¹ 15 U.S.C. 2064. As amended by the Consumer Product Safety Commission Improvements Act of 1976, however, Section 15 now authorizes the Commission to seek a preliminary injunction restraining the distribution in commerce of a consumer product during pendency of a proceeding under Section 15(d) for the repair, replacement, or repurchase of such product. 15 U.S.C. 2064(c), added by P.L. 94-284.

⁴² 15 U.S.C. 2053(d), added by P.L. 94-284, § 5. Congress made clear, however, that in providing this remedy for those injured by the Commission's regulatory errors, it did "not intend [to] chill the Commission from exercising its statutory responsibility to protect the public from dangerous products." H. Rep. No. 1022, 94th Cong., 2d sess. 19 (1976) (Conference Report), and toward that end it directed that any judgments awarded under this provision be paid from the general treasury, not the Commission's appropriations. 15 U.S.C. 2081(c), added by P.L. 94-284, § 5.

⁴³ As Senator Moss has noted: "[O]ne could identify two missions for the Consumer Product Safety Commission—a primary mission and a subsidiary mission. The subsidiary mission is an effort at regulatory reform. The Consumer Product Safety Act is loaded with regulatory innovations." Hearings on S. 644 and S. 1000 Before the Subcom. for Consumers of the Senate Comm. on Commerce, 94th Cong., 1st Sess., Serial No. 94-12, at 1 (1975).

sumer participation.⁴⁴ In numerous places, provision is made for consumer participation; for example, instead of using the traditional provision allowing participation by any "interested person," often the act explicitly recognizes a role for "consumers." Although some avenues of consumer participation provided for by the Act were already opened by consumers through either informal action or court decisions, these avenues are written into the statute explicitly, in a significant departure from past practice. The novel procedure for development by private parties of consumer product safety standards, set out in Section 7,⁴⁵ expressly requires that "consumers and consumer organizations" be afforded the opportunity to participate. Significantly, such participation is in the prepublication stage of the rulemaking, i.e., prior to the time any rule has actually been drafted or proposed by the Commission.⁴⁶

Recognizing that participation in administrative proceedings is expensive, Congress granted the agency broad discretion to fund "offerors" (private standard developers).⁴⁷ Congress recently added provisions to the Act authorizing the courts to award the costs of suit, including attorneys' fees and expert witnesses' fees,⁴⁸ in order "to enable interested persons who have rights under the Consumer Product Safety Act to vindicate those rights."⁴⁹

Section 10 authorizes "[a]ny interested person, including a consumer or consumer organization," to petition the Commission to commence a proceeding for the development of a consumer product safety rule.⁵⁰ Section 11 authorizes judicial review of a consumer product safety rule by "any person adversely affected by such rule, or any consumer or consumer organizations,"⁵¹ thus effectively defeating the recently imposed judicial limitations on standing.⁵² Section 15 requires that in any proceeding to determine whether a product is a "substantial product hazard" the Commission afford an opportunity for a hearing to "interested persons, including consumers and consumer organizations * * *."⁵³

⁴⁴ See, e.g., Senate Report No. 835, 92d Cong., 2d sess. 12 (1972) (recognizing the "basic policy of this bill to encourage consumer participation in the procedure and processes of the agency").

⁴⁵ Section 7(d)(3)(B), 15 U.S.C. 2056(d)(3)(B).

⁴⁶ In addition to enhancing consumer participation, Congress sought in Section 7 to structure pre-publication activity in rulemaking proceedings so as to equalize the opportunity of all concerned, both consumers and industry, to influence the shape of the proposed standard. Because the proposed rule is often similar to the final rule, pre-publication participation is crucial in determining the ultimate outcome of the rulemaking. It is generally assumed that various narrow interests, usually but not always, industry interests have had superior influence. Section 7 partially redresses this imbalance.

⁴⁷ Section 7(d)(2), 15 U.S.C. 2056(d)(2).

⁴⁸ Consumer Product Safety Commission Improvements Act of 1976, P.L. 94-284, § 10.

⁴⁹ H. Rep. No. 1022, 94th Cong., 2d sess. 22 (1976) (Conference Report accompanying Consumer Product Safety Commission Improvements Act of 1976).

⁵⁰ 15 U.S.C. 2059(a).

⁵¹ 15 U.S.C. 2060(a). The standard of review is "substantial evidence on the record taken as a whole," Section 11(c), 15 U.S.C. 2060(c), rather than the traditional, less strict "arbitrary and capricious" standard. See H.R. Rep. No. 1153, 92d Cong., 2d sess. 38 (1972).

⁵² The judicial trend toward a more liberal law of standing which culminated with the decision in *United States v. SCRAP*, 412 U.S. 669 (1973), has been sharply reversed by recent cases. See, e.g., *Simon v. Eastern Kentucky Welfare Rights Organization*, 96 S.Ct. 1917 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975). Though Section 11 antedates *Warth* and *Eastern Kentucky*, the statute's explicit grant of a right of judicial review to consumers defeats the application of those cases to such petitioners.

⁵³ 15 U.S.C. 2064(c), (d). Because the Section 15 hearing is required to be conducted in accordance with Section 5 of the Administrative Procedure Act, 5 U.S.C. 554, consumers have full rights of cross-examination, 15 U.S.C. 2064(f).

Section 24 embodies the "private Attorney General" concept, authorizing "[a]ny interested person," a term which includes consumers,⁵⁴ to bring an action in the Federal district courts for injunctive relief to enforce a consumer product safety rule or an order under Section 15.⁵⁵ One third of the members of the Product Safety Advisory Council, the statutory advisory committee created by Section 28 of the Act, must be selected from among "consumer organizations, community organizations, and recognized consumer leaders."⁵⁶ Finally, the authority granted the Commission under Section 27(b)(6) to accept "gifts and voluntary and uncompensated services" provides an additional avenue for consumers to participate in the work of the agency.⁵⁷

(b) *Agency independence and responsiveness.*—In attempting to assure fairness, Congress sought to increase agency independence from interests which historically have had undue influence in other regulatory agencies—the regulated industry and the executive branch.⁵⁸ Upon being so designated by the President, the Chairman serves in that capacity not at the pleasure of the President but until the conclusion of his term as a Commissioner.⁵⁹ The Vice Chairman is not appointed by the President but elected annually by the Commission.⁶⁰ A provision added by the Consumer Product Safety Commission Improvements Act of 1976 prohibits the political clearance of any Commission employee.⁶¹ The Commission is required to submit any budgetary and legislative proposals that it submits to OMB simultaneously,

⁵⁴ When referring to "any interested person," the CPSC frequently specifies that the term includes "consumers and consumer organizations," see, e.g., Section 7(d)(3)(B), 15 U.S.C. 2056(d)(3)(B), Section 10(a), 15 U.S.C. 2059(a); Section 15(c), (d), 15 U.S.C. 2064(c), (d), and the Act's omission of that specification here would appear to be inadvertent. In any case, the term "interested person" commonly defines an extremely broad class. Compare 5 U.S.C. 553(c) (Administrative Procedure Act rulemaking provision authorizing participation by "interested persons," a term which has been generally construed by Federal agencies to include anyone who desires to participate), with 5 U.S.C. 702 (Administrative Procedure Act judicial review provision limiting the right of review to persons "adversely affected or aggrieved," a class which judicial decisions have sharply limited). Particularly as used in the CPSC, which contains numerous explicit references to the fact that "any interested person" includes "consumers and consumer organizations," the term "interested person" as used in Section 24 must include consumers.

⁵⁵ 15 U.S.C. 2073.

⁵⁶ 15 U.S.C. 2077(a)(3).

⁵⁷ 15 U.S.C. 2076(b)(6).

⁵⁸ Interestingly, the Consumer Product Safety Commission is the only independent regulatory agency which Congress has actually designated as an "independent" agency, Section 4(n), 15 U.S.C. 2053(a), a fact which has been carefully noted. See Joint Hearings on Consumer Product Safety Commission Oversight Before the Senate Comm. on Commerce and the Senate Comm. on Government Operations, 93d Cong., 2d sess., serial No. 93-100, at 1-2 (remarks of Sen. Moss), 9 (remarks of Chairman Simpson) (1974). But see *id.* at 25, 45. The statement in the House Report that the Commission was created "in the image of other regulatory commissions which have been created by the Congress to regulate the essential industries of rail and air transportation, oil and gas production, communications, and the securities markets," H. Rep. No. 1153, 92d Cong., 2d sess. 29 (1972), seems to indicate that, while Congress attempted to structure the CPSC in a fashion which would ensure its functional independence, it did not intend to locate the new agency at a different point in the governmental matrix from other independent regulatory commissions.

⁵⁹ Section 4(a), 15 U.S.C. 2053(a).

⁶⁰ Section 4(d), 15 U.S.C. 2053(d).

⁶¹ "The appointment of any officer (other than a Commissioner) or employee of the Commission shall not be subject directly or indirectly, to review or approval by any officer or entity within the Executive Office of the President." Section 4(g)(4), 15 U.S.C. 2053(g)(4), added by Public Law 94-284, § 4(b); see H. Rep. No. 325, 94th Cong., 1st sess. 16 (1975) (noting that political clearance is "totally inappropriate for an independent regulatory agency"); H. Rep. No. 1022, 94th Cong., 2d Sess. 17-18 (1976) (Conference Report) (noting that White House political clearance is "not consistent with the purpose or function of an independent agency"). The origins of this provision are discussed later in this chapter. For further discussion of political clearance, see chapter 2 of this Report.

and without prior clearance, to the Congress.⁶² Commissioners may not be removed for "inefficiency," as may the Commissioners of some other regulatory agencies, but only for "neglect of duty or malfeasance in office."⁶³ Some have expressed doubt as to the practical significance of this provision.⁶⁴ By authorizing the Commission to represent itself in civil litigation if the Attorney General refuses to do so,⁶⁵ the 1976 Improvements Act has lessened the influence of the executive branch in the determination of enforcement policy.⁶⁶

To increase the Commission's insulation from undue influence by the regulated industry, the Act sets strict conflict of interest requirements for Commissioners.⁶⁷ It prohibits them and their chief employees from accepting employment with regulated manufacturers for one year after leaving the Commission.⁶⁸ It requires also that the Commission's Annual Report include a log or summary of all meetings held between Commission officials and persons affected by the Commission's regulatory activities.⁶⁹

In addition to attempting to ensure the new agency's independence from narrow interests, Congress sought to make it responsive to the public.⁷⁰ For example, any interested person, including a consumer, may petition the agency for the issuance of a consumer product safety rule, as noted elsewhere.⁷¹ This right to petition the agency is a substantial improvement over the right to petition conferred by the Administrative Procedure Act.⁷² The Commission must respond to a Section 10 petition within 120 days. If it denies the petition, it must state its reasons.⁷³ Furthermore, a petitioner who considers the denial to be in error may seek judicial review in a *de novo* proceeding,⁷⁴ fore-

⁶² Section 27(k), 15 U.S.C. 2075(k).

⁶³ Section 4(a), 15 U.S.C. 2053(a); see H.R. Rep. No. 1153, 92d Cong., 2d sess. 29 (1972) (noting that "[b]y delineating the bases for removal, your committee intends to restrict the President's power to remove from office to these grounds alone").

⁶⁴ Scalia & Goodman, "Procedural Aspects of the Consumer Product Safety Act," 20 U.C.L.A. L. Rev. 889, 904 (1973) (noting that "even under the more permissive standard, no member of any independent regulatory commission has ever been removed by the President since the Supreme Court established Congress' right to insulate such agencies from executive control in 1935").

⁶⁵ This provision is similar to Section 16 of the Federal Trade Commission Act, 15 U.S.C. 56, as amended by P.L. 93-637 (Magnuson-Moss Warranty—Federal Trade Commission Improvement Act).

⁶⁶ P.L. 94-284, § 11.

⁶⁷ Section 4(c), 15 U.S.C. 2053(c). The House Report noted: "The committee recognizes that these restrictions are severe. It is intended by them to create a standard for members of the Commission which will assure that they are their own masters and are known to be such." H. Rep. No. 1153, 92d Cong., 2d sess. 30 (1972).

⁶⁸ Section 4(g)(2), 15 U.S.C. 2053(g)(2). "This restriction is intended to assure that persons will not seek employment with the agency or use their Federal office as a means of subsequently gaining employment in the regulated industry or as a means of acquiring members of industry as future clients." H.R. Rep. No. 1153, 92d Cong., 2d sess. 30 (1972). It should be noted that there is an apparent discrepancy between the statute's restriction, which applies only to regulated "manufacturers" (presumably including importers), and this Report, which implies that the restriction has much broader applicability, reaching to all the "regulated industry."

⁶⁹ Section 27(j)(8), 15 U.S.C. 2076(j)(8).

⁷⁰ Independence and responsiveness are closely linked. The Senate Report considered independence "a crucial element" for making agencies more responsive. S. Rep. No. 749, 92d Cong., 2d sess. 8 (1972).

⁷¹ Section 10, 15 U.S.C. 2059. "The basic policy behind this provision is that the Agency should be responsive and accountable to the public." S. Rep. No. 835, 92d Cong., 2d sess. 14 (1972).

⁷² 5 U.S.C. 553(e).

⁷³ Section 10(d), 15 U.S.C. 2059(d).

⁷⁴ In the course of explaining its use of this most stringent standard of judicial review, one of the Senate Reports noted: "Agency action affecting interests in life and health should be subject to the most searching judicial examination. In our view, the importance of these interests justifies a departure from the normal standard of review. In such cases, substantial evidence in the record should not be sufficient to sustain the agency action. The petitioner must prove the unreasonable risk by a preponderance of the evidence, the usual standard in civil cases." S. Rep. No. 835, 92d Cong., 1st sess. 13 (1972).

ing the agency, if petitioner prevails, to commence a rulemaking proceeding.⁷⁵ The Act specifically requires the Commission to consider how its actions affect those it regulates.⁷⁶ The improved opportunities for consumer participation, previously discussed, also help to create a responsive agency.

(e) *Information gathering powers.*—Recognizing the value of accurate and complete information about regulated industries, Congress gave the new Commission a variety of information-gathering powers:

If the Commission is to act responsibly and with adequate basis, it must have complete and full access to information relevant to its statutory responsibilities. Accordingly, the Committee has built into this bill broad information-gathering powers.⁷⁷

As noted above, Section 5(a) directs the Commission to:

(1) Maintain an Injury Information Clearing House to collect, investigate, analyze, and disseminate injury data, and information, relating to the causes and prevention of death, injury, and illness associated with consumer products; and

(2) Conduct such continuing studies and investigations of deaths, injuries, diseases, other health impairments, and economic losses resulting from accidents involving consumer products as it deems necessary.⁷⁸

In addition, Section 5(b) authorizes the Commission to conduct its own research and studies on the safety of consumer products and on improving their safety, including actual testing of the products.⁷⁹ The Commission is given liberal authority also for making grants and entering into contracts to achieve the purposes of Section 5.⁸⁰

The Act enables the Commission to go directly to the regulated industry for information. It makes available to the Commission virtually any information in the possession of manufacturers on the safety of the consumer products they produce. For example, Section 27(e) empowers the Commission to require by rule any manufacturer to provide to the Commission "such performance and technical data related to performance and safety as may be required to carry out the purposes of this Act. . . ." ⁸¹ The Commission may actually require the preparation of data in a form deemed most useful by the Commission. Under Section 27(b)(1) the Commission may order any person to "submit in writing such reports and answers to questions as the Commission may prescribe * * *." ⁸²

Section 16(b) requires manufacturers and distributors to "establish and maintain such records, make such reports, and provide such information as the Commission may, by rule, reasonably require for the purposes of implementing this Act" and to permit Commission officers to inspect the books and records of those persons which are "relevant" to determining whether they are acting in compliance with the Act.⁸³ The Commission has subpoena power, extending to "the

⁷⁵ Section 10(e), 15 U.S.C. 2059(e).

⁷⁶ Sections 7, 9, 15 U.S.C. 2056, 2058; see H. Rep. No. 1022, 94th Cong., 2d sess. 30 (1976).

⁷⁷ H. Rep. No. 1153, 92d Cong., 1st sess. 31 (1972).

⁷⁸ 15 U.S.C. 2054(a).

⁷⁹ 15 U.S.C. 2054(b).

⁸⁰ 15 U.S.C. 2054(c).

⁸¹ 15 U.S.C. 2076(e).

⁸² 15 U.S.C. 2076(b)(1).

⁸³ 15 U.S.C. 2065(b).

attendance and testimony of witnesses and the production or all documentary evidence relating to the execution of its duties.”⁸⁴

To enable the Commission to keep pace with technological developments, the Act provides for the unsolicited submission of product safety data by manufacturers. Section 13(a) authorizes the Commission to require by rule that manufacturers of new consumer products “furnish notice and a description of such product to the Commission before its distribution in commerce.”⁸⁵ The requirement of section 15(b)⁸⁶ that manufacturers notify the Commission of substantial product hazards ensures that the Commission will have a continuous flow of information on problems which develop with existing products.

(d) *Elimination of conflicting regulation.*—A frequent problem with government regulation has been the complexity and conflict which result from overlapping Federal and State regulation. One of Congress’ purposes in enacting the Consumer Product Safety Act was to develop uniformity under Federal jurisdiction and “to minimize conflicting State and local regulations * * *.”⁸⁷ Toward that end, the Act directs the Commission to “establish a program to promote Federal-State cooperation for the purposes of carrying out this Act.”⁸⁸ It gives the Commission broad authority to preempt State and local product safety regulation.⁸⁹ The Consumer Product Safety Commission Improvements Act of 1976 amended both the CPSA and the transferred acts so as to make their respective preemption provisions similarly broad.⁹⁰

(e) *Congressional oversight.*—The Consumer Product Safety Act contains specific provisions which look toward more effective Congressional oversight.⁹¹ As originally enacted, the Act authorized appropriations for only the first 3 years of the agency’s life, thereby forcing the legislative committees to review the performance of the agency at the end of that period.⁹² The 1976 Improvements Act requires the Commission to transmit proposed rules to the appropriate congressional committees.⁹³

⁸⁴ 15 U.S.C. 2076(b)(3).

⁸⁵ U.S.C. 2062(a) : see H. Rep. No. 1153, 92d Cong., 2d sess. 39 (1972). This section provides the Commission “with a means of keeping abreast of new products entering the market place”.

⁸⁶ 15 U.S.C. 2064(b).

⁸⁷ 15 U.S.C. 2051(b)(3).

⁸⁸ 15 U.S.C. 2078(a).

⁸⁹ 15 U.S.C. 2075. “As a general rule it is intended that Federal authority—once exercised—with respect to a risk of injury or illness broadly preempt State authority to regulate the same risks of injury except through requirements which are identical to the Federal requirements” H. Rep. No. 325, 94th Cong., 1st sess. 21 (1975) (report accompanying Consumer Product Safety Commission Improvements Act of 1976) : see H. Rep. No. 1153, 92d Cong., 2d sess. 49 (1972).

⁹⁰ Section 17, P.L. 94-284 : see H. Rep. No. 325, 94th Cong., 1st sess. 23 (1975) (noting that the uniform preemption policy established by the 1976 Improvements Act “will eliminate confusion and provide uniformity of administration by the Commission”).

⁹¹ These provisions, of course, are merely supplementary to the basic oversight authority contained in the Constitution, 2 U.S.C. 190d and the rules of the two Houses of Congress, including Rule X.2, Rules of the House of Representatives.

⁹² Section 32, 15 U.S.C. 2081 : see Hearings on H.R. 5361 and H.R. 6107 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st sess., serial No. 94-30, at 221 (1975) (Rep. McCollister stating that three-year authorization provision “give[s] us the discipline of some oversight . . . which we are obligated to do and which most committees of this Congress do most inadequately”). Congress continued to use this oversight-forcing device in enacting the Consumer Product Safety Commission Improvements Act of 1976, which authorizes appropriations for only three more years, 15 U.S.C. 2081(a), as amended by P.L. 94-284, § 2 : see S. Rep. No. 251, 94th Cong., 1st Sess. 4 (1975) (noting that authorization for a fixed period of time “will enable the Committee, when considering future authorizations for appropriations, to assess thoroughly the Commission’s performance”). Similar provisions have been included in other “regulatory reform” legislation in recent years. See, e.g., Section 20 of the Federal Trade Commission Act, 15 U.S.C. 57c, added by P.L. 93-437 (Magnuson-Moss Warranty-Federal Trade Commission Improvement Act).

⁹³ Public Law 94-284, § 14. There is no provision, however, for a Congressional veto of final rules.

Congress has directed the Commission to assist it in its oversight function by providing it with information and, where appropriate, recommendations for new legislation.⁹⁴ Use of a regulatory agency to collect and distill information for use in the legislative process is not uncommon. Congress has frequently supplemented its legislative investigatory capability in this way. In contrast to the vague reporting specifications in some other regulatory legislation, the CPSC's requirement of an Annual Report stipulates a number of specific evaluations and other types of information.⁹⁵ As previously noted, the agency has been granted a broad range of powers to obtain the information needed fully to comply with this requirement. Such reporting to the Congress in the oversight process is always important for keeping government regulatory policy abreast of new developments. In the operation of the CPSC, it is crucial. In creating the Commission, Congress was venturing into unfamiliar waters.⁹⁶ The dimensions of the task of assuring the safety of consumer products had not been completely determined nor could the best means of proceeding with the task be identified with certainty. In order that, if necessary, it would be able to tailor the structure of CPSC to conform more closely to its legislative mandate, Congress arranged to have the benefit of the Commission's knowledge and experience in the field through a well-conceived plan of reporting.

III. Implementation of Mandate

As its impressive array of regulatory weaponry implies, the Commission does not have a simple task. As a horizontal agency,⁹⁷ i.e., one which regulates a certain aspect of behavior in the marketplace, the Commission faces challenges common to all such agencies. The Commission estimates that its regulatory domain includes upwards of 2.5 million firms, perhaps 50% of all firms in the United States,⁹⁸ and more than 10,000 products.⁹⁹ Such broad responsibilities entail difficult issues in selecting strategies and targets which will maximize the Commission's achievements.

Despite the Commission's heavy task, it has had to operate under budgetary constraints. With a budget slightly less than \$40 million and a force of approximately 900,¹⁰⁰ CPSC is the smallest

⁹⁴ Section 27(j), 15 U.S.C. 2076(j). Professor Theodore J. Lowi, testifying before the Subcommittee, was critical of Congress for its failure to make more frequent use of the learning of the agencies it has created. *Joint Hearings on Regulatory Reform Before the Sen. Comm. on Commerce and Govt. Operations and the Subcom. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess., Vol. I, Serial No. 94-50 at 19 (1975).

⁹⁵ Section 27(j), 15 U.S.C. 2076(j).

⁹⁶ The Senate report noted five needs the new agency would meet, two of which were "Detection of Products Causing Injury or Death" and "Determination of which products are presenting unreasonable risk of injury or death." S. Rep. No. 749, 92d Cong., 2d Sess. 5-8 (1972). Even after having studied the problem for two years, the National Commission on Product Safety was forced to recognize that "[d]ata on the number and nature of injuries from consumer products remain far from satisfactory. . . ." National Commission on Product Safety, *Final Report Presented to the President and Congress* 2 (1970).

⁹⁷ Horizontal regulatory agencies are to be distinguished from vertical regulatory agencies, such as the Federal Communications Commission and the Federal Power Commission, which regulate a specific industry or industries.

⁹⁸ *Hearings*, *supra* note 2, at 266 (Commission's description of regulated industry, provided in response to question 3 Subcommittee questionnaire of June 1975).

⁹⁹ *Hearings* at 4, 23 (testimony of Chairman Simpson).

¹⁰⁰ Congress appropriated \$30 million for fiscal year 1977, P.L. 94-378. A breakdown of the Commission's professional work force among the various disciplines, such as engineering, law, health sciences, and administrative, may be found in the Commission's response to question 71 of the Subcommittee's questionnaire, reprinted in *Hearings* at 244.

of the nine in this Report. Because the agency is being held at this funding level,¹⁰¹ as prices and wages rise, it is actually shrinking in size and capabilities:

When inflation and the increased number of standards which the Commission will each year be required to enforce are taken into account, these budget policies in effect result in substantial budget cuts, increasing in magnitude each year.¹⁰²

This practice was characterized by the Subcommittee Chairman as "deregulation through budget slashing."¹⁰³

The severity of the Commission's budgetary squeeze is emphasized by the gap between the funds authorized and the funds appropriated. The Commission has consistently been funded at about two-thirds of the level authorized in the Consumer Product Safety Act.¹⁰⁴ The Interstate and Foreign Commerce Committee pointedly took note of this in 1975 in reporting the legislation which became the Consumer Product Safety Commission Improvements Act of 1976:

The need for a higher level of appropriated funds has been amply set out in the Committee's records. * * * In order to accomplish its statutory goals in a timely fashion, the Committee is convinced that appropriations more nearly approaching the conservative levels authorized in this legislation are essential.¹⁰⁵

Events of the past year have brought a further deterioration in the Commission's budgetary situation. The Commission cannot achieve its mission without sufficient funds. In the Subcommittee's judgment, the Commission's funds have not been sufficient.

A. REGULATORY ASPECTS OF THE COMMISSION'S WORK

The Commission seeks to improve consumer safety by employing programs which affect both classes of marketplace participants; sellers and buyers. It regulates the sellers (manufacturers, distributors, importers, and retailers) directly, using prospective techniques, i.e., those which result in the production of safer products, and retrospective techniques, i.e., those which seek to remove unsafe products from the market. In contrast, the Commission's tactics toward buyers are not coercive but seek merely to influence their decisions through the use of

¹⁰¹ The funding levels in fiscal year 1976 and fiscal year 1977 were virtually identical. Moreover, the Office of Management and Budget has indicated its desire to continue funding the Commission at this level. Letter from OMB Deputy Director Paul H. O'Neill to CPSC Chairman Richard O. Simpson, dated Jan. 29, 1976, reprinted in 122 Cong. Rec. E 608 (daily ed. Feb. 11, 1976) (remarks of Rep. Moss).

¹⁰² 122 Cong. Rec. E 608 (daily ed. Feb. 11, 1976) (remarks of Rep. Moss); see *Hearings* at 1-2, 64-65.

¹⁰³ *Hearings* at 1-2.

¹⁰⁴ See the following table:

	Amount authorized (thousands)	Amount appropriated (thousands)
Fiscal year:		
1974.....	59,000	34,776
1975.....	64,000	* 36,954
1976.....	51,000	* 39,564
Transition quarter.....	14,000	* 9,955
1977.....	60,000	39,000

* Indicates amount actually available to agency after rescission.

¹⁰⁵ H. Rep. No. 325, 94th Cong., 1st sess. 11-12 (1975).

information and educational activities. The Commission's resources have been devoted mainly to regulating sellers, not to influencing buyers.¹⁰⁶

1. Actions affecting sellers of consumer products.—A major policy issue before the Commission has concerned allocation of resources between prospective and retrospective actions: i.e., how much effort should be devoted to developing a regulatory structure which will result in safer products being produced in the future relative to the effort devoted to ridding the marketplace of unsafe products already in existence?

(a) Prospective activities.—The Commission's prospective program includes the issuance of bans on risky consumer products and the setting of standards for others, i.e., safety requirements which consumer products must meet in order to be introduced into interstate commerce.¹⁰⁷ The Commission has relied on both mandatory and voluntary requirements.

i. Mandatory requirements.—The Commission has authority to set standards and issue bans under its basic legislation, the Consumer Product Safety Act,¹⁰⁸ and under several of the transferred acts, including the Flammable Fabrics Act,¹⁰⁹ the Federal Hazardous Substances Act,¹¹⁰ and the Poison Prevention Packaging Act.¹¹¹ Although it has acted under each of these authorities, the total number of standards and bans, completed and underway, comes to less than 25, including some partially developed by the Commission's predecessors.

Mandatory standard setting is a complex process which is both costly and time-consuming. The power lawn-mower standard being developed under the Consumer Product Safety Act has required more than 11,000 man-hours and \$800,000 of Commission resources in addition to the \$166,000 that was provided to the private developer, Consumers Union of the United States.¹¹² The total time required to develop a standard is consistently much more than a year.¹¹³

With more than 10,000 consumer products in its jurisdiction, the Commission has no intention of writing so many standards. Instead, it could write "generic" standards: e.g. a standard to avert shock hazards in portable cord-connected electric appliances.¹¹⁴ Former Chair-

¹⁰⁶ Of the Commission's total fiscal year 1976 budget of \$39,564 million, \$2.5 million was allocated for information and education.

¹⁰⁷ As defined by the CPSA:

A consumer product safety standard shall consist of one or more of any of the following types of requirements:

(1) Requirements as to performance, composition, contents, design, construction, finish, or packaging of a consumer product.

(2) Requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions.

Any requirement of such a standard shall be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such standard (other than requirements relating to labeling, warnings, or instructions) shall, whenever feasible, be expressed in terms of performance requirements.

Section 7(a), 15 U.S.C. 2056(a).

¹⁰⁸ Sections 7, 8, 15 U.S.C. 2056, 2057.

¹⁰⁹ Section 4, 15 U.S.C. 1193.

¹¹⁰ Sections 2, 3, 15 U.S.C. 1261, 1262. The Commission has properly used the flexibility inherent in this banning authority to issue rules which are in the nature of a standard. See, e.g., 16 C.F.R. 1507 (ban of certain fireworks devices).

¹¹¹ Section 3, 15 U.S.C. 1472. The Refrigerator Safety Act also provides for the setting of standards. 15 U.S.C. 1213.

¹¹² Hearings at 341. Although the offeror in this proceeding was a consumer group, the cost to the Commission was not greater than the cost in proceedings with industry offerors. The cost here was quite typical of standard development proceedings.

¹¹³ *Id.* at 11.

¹¹⁴ Hearings on Appropriations for 1977 Before the Subcomm. on HUD-Independent Agencies of the House Comm. on Appropriations, 94th Cong., 2d sess., pt. 1, at 33-34 (1976).

man Simpson believed that, with 100 standards, the Commission could eliminate most of the preventable product hazards and associated injuries.¹¹⁵ He developed a "self-destruct plan" for the completion of this objective and the subsequent abolition of the agency.¹¹⁶

While no doubt it is useful to consider whether the mission of an agency can be completed in a fixed period of time, Chairman Simpson's stated goal fails to take account of a number of factors.¹¹⁷ First eliminating 75 percent of the standards—preventable injuries with 100 standards requires the selection of the most hazardous products as primary targets. The Commission chose swimming pool slides as one of its first standards development efforts. It should choose more wisely in the future. Moreover, despite the declared intention to rely heavily on generic standards, the Commission has not done so. Second, the Commission has enforcement responsibilities which will persist long after standards have been promulgated. Third, many injuries are not standards-preventable. They can be addressed best by continuing information and education. These programs are slow to take effect and their effect is dissipated if they are not continued. Fourth, new products will undoubtedly require new standards.¹¹⁸

ii. Voluntary standards.—Because of its chronic budgetary problem, the Commission has turned increasingly to the use of voluntary standards.¹¹⁹ The Commission cooperates with and assists organizations which act voluntarily to develop standards to reduce or eliminate product hazards.

The Commission may participate in these voluntary efforts, provided it is satisfied with the merit of the standard expected to be developed, the potential for a high rate of self-enforced industry compliance, and the degree of consumer participation.

Although a voluntary standards program can have the salutary effect of amplifying the range of the Commission's activity, voluntary standards are not an ideal procedure. The National Commission on Product Safety was highly skeptical of both their adequacy and the likelihood of an acceptable rate of compliance:

As related to product safety, self-regulation by trade associations standards groups, drawing upon the resources of professional associations and independent testing laboratories, is legally unenforceable and patently inadequate.¹²⁰

Furthermore, consumer participation in the writing of voluntary standards is often nonexistent or inadequate.¹²¹ Because Congress has

¹¹⁵ The Commission estimates that between 15 and 25 percent of all product associated injuries are preventable by standards. Hearings at 4, 24. 75 percent of these standards-preventable injuries would be addressed by the first 100 standards. *Id.* at 22, 30.

¹¹⁶ *Id.* at 371 (Appendix H). Although Chairman Simpson strongly supported this plan in his testimony, *id.* at 22, 30-31, the plan was sharply criticized by Commissioner Franklin, *id.* at 48 and Pittle, *id.* at 40-41.

¹¹⁷ Hearings at 40-41 (testimony of Commissioner Pittle); *id.* at 48 (testimony of Commissioner Franklin).

¹¹⁸ Hearings on Appropriations for 1977 Before the Subcomm. on HUD-Independent Agencies of the House Comm. on Appropriations, 94th Cong., 2d sess., pt. 1, at 43 (1976).

¹¹⁹ Hearings on Appropriations for 1977 Before the Subcomm. on HUD-Independent Agencies of the House Comm. on Appropriations, 94th Cong., 2d sess., pt. 1, at 8 (1976); Consumer Product Safety Commission, *Annual Report* 24-25 (1975). Commissioner Franklin recommended that the Commission use voluntary standards even more frequently: "[V]oluntary efforts . . . should complement and be compatible with the development of mandatory standards. And, they should grow in importance. I believe the Commission should allocate more staff and dollar resources to stimulate and guide the voluntary standards effort." Hearings at 46.

¹²⁰ National Commission on Product Safety, *Final Report to the President and Congress* 2 (1970); see *id.* at 48-51.

¹²¹ See *id.* at 52-53, 56.

explicitly declared in Section 7 of the Consumer Product Safety Act its intent that consumers have a substantial role in the development of standards, Commission participation in the writing of voluntary standards where there is insufficient consumer participation is not in accordance with the spirit of the Act.¹²²

(b) *Retrospective actions.*—The Commission may apply a variety of procedures for removing hazardous products from the marketplace or otherwise protecting consumers from such products. The most frequently used is the procedure authorized by Section 15 of the CPSA.

i. *Section 15 of the Consumer Product Safety Act.*—The Commission calls the implementation of Section 15 its greatest success story.¹²³ In its first 2½ years, the Commission processed 350 notifications from manufacturers suggesting the possibility of a substantial product hazard in no less than 24 million items. As a result, 4 million products presenting potential hazards to consumers were corrected, usually through negotiation between the Commission and the manufacturer rather than through formal proceedings, all at no cost to consumers.¹²⁴

Whether Section 15 is truly a success story depends perhaps most on whether sellers of consumer products are fulfilling their obligations under Section 15(b) to notify the Commission of potential substantial product hazards. A high rate of compliance with the reporting requirement is the key to the success of Section 15. Commission policy is "to enforce vigorously" this requirement.¹²⁵ The Commission is emphasizing this requirement to manufacturers, distributors, and retailers.¹²⁶ Nevertheless, as suggested by Representative Andrew Maguire at Subcommittee hearings, with 10,000 consumer products being sold by 2.5 million firms, a mere 350 notifications in 2½ years may indicate a failure by some firms to report.¹²⁷

In response, Chairman Simpson stated:

I don't know. I think it has been adequate. We tried to follow up and have not found anybody in our investigations that is violating the 15(b) reporting provision.¹²⁸

Chairman Simpson offered no evidence to support his assertion.

ii. *Seizures.*—The Commission has used its authority under the Federal Hazardous Substances Act, the Flammable Fabrics Act, and the Poison Prevention Packaging Act with some frequency to seize hazardous products.¹²⁹ These efforts generally have been successful: only a handful of claimants successfully resisted the Commission in court.¹³⁰

iii. *Imminent hazard authority.*—The Commission has used its authority under Section 12 of the Consumer Product Safety Act to remove imminently hazardous consumer products from the market

¹²² While the Commission can perhaps to some degree represent the consumer interest in voluntary standards proceedings, its primary responsibility is to regulate in the public interest, striking a balance between industry interests and consumer interests. Although this balance must generally favor consumers, in keeping with the intent of Congress, Commission participation cannot be a substitute for vigorous, effective consumer participation.

¹²³ *Hearings* at 5, 24.

¹²⁴ *Id.* at 6, 24.

¹²⁵ 16 C.F.R. 1116.3(b).

¹²⁶ *Hearings* at 195-96 (response to Subcommittee's written questions).

¹²⁷ *Id.* at 140.

¹²⁸ *Id.*

¹²⁹ There has been no occasion to use the authority granted by Section 22 of the CPSA, 15 U.S.C. 2071, to seize products failing to comply with a consumer product safety rule because the first such rule has only recently been promulgated.

¹³⁰ Consumer Product Safety Commission, *Annual Report* 36 (1975).

only once, prompted by a hand-held, electric light. The Commission succeeded in having the product declared by a court of law to be an imminently hazardous consumer product. The court's order enjoined the defendants from manufacturing and distributing the product and directed them to recall already manufactured items. The court refused the Commission's request for an order directing the defendants to conduct a paid national advertising campaign to warn consumers of the dangers of this product.¹³¹

The Commission also has used the imminent hazard power available under the Federal Hazardous Substances Act ¹³² once. In that instance, it issued an administrative order declaring certain spray adhesives to be an imminent hazard.¹³³ Upon completion of further studies some months later, this order was rescinded.¹³⁴

2. *Actions affecting buyers of consumer products.*—The Commission disseminates information and educational materials on consumer product safety widely. Rather than rate individual products according to safety, the Commission emphasizes the safe use of types of products. For example, the Commission's Guide to Fabric Flammability (April 1975) describes Federal law relating to fabric flammability, explains how to care for fabrics which have been treated to be flame retardant, discusses factors to be considered in choosing garments made of flame retardant chemicals, and points out the best way to avoid burns from flammable fabrics.

The Commission does not give such information and education a high priority. In 1975 the Commission spent \$3.7 million out of a total budget of nearly \$37 million on information and education. In Fiscal Year 1976, the Commission spent approximately \$2.5 million on this function. Commissioner Kushner suggested that both the Commission and Congress tend to underestimate the importance of these activities:

It seems to me that the Commission has an excellent mission, an adequate mission, but that people tend to overlook the fact that it is a four-part mission. Particularly in connection with oversight, perhaps one finds an overemphasis on the regulatory aspects of the Commission.

Our comments here today have already gone in that direction. But two parts of the mission have to do with helping the public to become better informed consumers with respect to safety and to promote research and development that would be useful in this field.

I think that unless oversight begins to pay some attention to these functions and being sure that the Commission has adequate resources to do them, we'll only be directing our efforts toward the 15 percent to 20 percent of the possibly correctable or eliminatable injuries.¹³⁵

Information and education can serve a useful function in promoting consumer product safety, particularly if given effective means of communicating with the public. Systematic public education is practically the only means available to the Commission to decrease the number of injuries which are not preventable by enforcement of safety standards.¹³⁶

¹³¹ *Consumer Product Safety Commission v. A. K. Electric Corp.*, Civil Action No. 74-1206 (D.D.C., September 9, 1974).

¹³² Section 2(q)(2), 15 U.S.C. 1261 (q)(2).

¹³³ 38 Fed. Reg. 22569, 23355, 25216 (1973).

¹³⁴ 39 Fed. Reg. 3582 (1974).

¹³⁵ *Hearings* at 5.

¹³⁶ *Consumer Product Safety Commission, Annual Report 27* (1975). Such injuries are thought to comprise about 80 percent of all product-associated injuries.

B. THE COMMISSION AND REGULATORY REFORM

The Commission has eagerly accepted Congress' mandate that it be a new kind of agency. It has worked hard at fulfilling that mandate.

1. *Openness.*—The Commission is one of the most open of the Federal agencies. Most of its meetings, including meetings between Commission personnel and private parties, are open to the public. It allows the public to have access to the vast majority of its files.

The Commission's stated policy is to allow members of the public to attend meetings involving Commission personnel in order to engage the public in its activities and to ensure public confidence in the integrity of Commission decision-making.¹³⁷

The Commission regularly publishes a Public Calendar which lists in advance all meetings between the Commissioners or other Commission officers and outside parties, as well as other Commission activities.¹³⁸ This Calendar is mailed without charge regularly upon request.¹³⁹ Most meetings listed in the Public Calendar are open to the public.¹⁴⁰ Members of the public may witness negotiations between the Commission and a private corporation pursuant to a Commission enforcement proceeding,¹⁴¹ although the Commission has followed the practice of other Federal agencies in electing to deliberate and vote in nonpublic sessions.¹⁴²

With regard to agency records, the Commission has a liberal disclosure policy:¹⁴³

The Commission's policy with respect to requests for records is that disclosure is the rule and withholding is the exception. All records not exempt from disclosure will be made available. Moreover, records which may be exempted from disclosure will be made available as a matter of discretion when disclosure is not prohibited by law, or is not against the public interest.¹⁴⁴

Pursuant to this policy the Commission releases to the public a number of types of documents whose release is not required by the Freedom of Information Act;¹⁴⁵ *e.g.*, drafts of internal documents:

¹³⁷ 16 C.F.R. 1012.1 provides:

(a) In order for the Consumer Product Safety Commission to properly carry out its mandate to protect the public from unreasonable risks of injury associated with consumer products, the Commission must involve the public to the fullest possible extent in its activities.

(b) To guarantee public confidence in the integrity of its decisionmaking, the Commission must, to the fullest possible extent, conduct its business in an open manner which is free from any actual or apparent impropriety.

(c) To achieve the goals set forth in paragraphs (a) and (b) of this section, the Commission believes that, wherever practicable, it should notify the public in advance of all meetings involving matters of substantial interest held or attended by its personnel and permit the public to attend such meetings. Furthermore, to ensure the widest possible exposure of the details of such meetings, the Commission should keep records of them which are freely available for inspection by the public.

¹³⁸ 16 C.F.R. 1012.3(a) (1).

¹³⁹ 16 C.F.R. 1012.3(a) (2).

¹⁴⁰ 16 C.F.R. 1012.4.

¹⁴¹ 16 C.F.R. 1012.4(c) (2) (II) (D).

¹⁴² 16 C.F.R. 1012.4(b).

¹⁴³ Although the Commission is justifiably proud of its openness policy, it should not forget that its primary responsibility is the promotion of consumer product safety. The Commission's response to question 5 of the Subcommittee's questionnaire—"How, in the past five fiscal years, has your Commission translated its basic policy into significant rulings, regulations, or programs? Give those examples you believe best illustrate such effect"—listed promulgation of Freedom of Information Act rules as the first example. If this was in fact the best example at that time of the Commission's implementation of its basic policies, it was failing miserably in the job Congress assigned it.

¹⁴⁴ 16 C.F.R. 1015.1(b), 41 Fed. Reg. 16576 (1976).

¹⁴⁵ 5 U.S.C. 552.

In keeping with its openness policy, the Commission will generally release drafts of its internal documents upon request even though these drafts would ordinarily be exempt from disclosure under 5 U.S.C. 552(b)(5). A draft of an internal document generally means any preliminary or incomplete version of a proposed or final rulemaking notice, a statement of interpretation or policy or a report or analysis. * * * the Commission will also release upon request documents or briefing packages which have been completed by the staff but not approved by the Commission.¹⁴⁶

Under this policy, anyone may inspect internal legal memoranda evaluating the merits of a given case. The Subcommittee was critical of this aspect of the disclosure at the hearing, suggesting that such disclosures give respondents' attorneys an advantage over Commission attorneys and lead the staff to refrain from expressing in writing the candid advice necessary for sound decision-making. In responding to questions from Subcommittee counsel, Commission Chairman Simpson denied that disclosure was impairing regulatory functions:

It can, but I don't think so. We are split in the Commission on that. I personally don't believe it [disclosure] undercuts it [enforcement.] I think it [disclosure] strengthens the enforcement capability. I am convinced private industry is as smart as we are and can read the statute as well as we can, so the enforcement strategies available to us are relatively limited.

I think if we go up front and release the strategy and then prosecute, it strengthens rather than weakens the case. I believe that. So I am in favor of releasing the strategies.¹⁴⁷

The Commission has been subject to substantial criticism for this aspect of its disclosure policy, from both within and without. Commissioner Franklin, who has been a particularly vigorous opponent of it, stated: "I do not think it is in the public interest to release our legal game plan to the other side."¹⁴⁸ It has also been criticized by consumer spokesmen.¹⁴⁹

The Commission has recently begun preparation of revised Freedom of Information Act rules that would allow withholding of these legal memoranda. The draft regulations would go further; they potentially represent a broad revision of the Commission's openness policy in favor of less disclosure. Although the Subcommittee believes the Commission has erred on occasion in releasing certain of its records to the public, such occurrences are isolated. The Subcommittee believes the Commission's openness policy is fundamentally sound and in keeping with the spirit of the Freedom of Information Act that disclosure is to be the rule and withholding the exception. We would view any major change in this policy as unwise.

With respect to congressional access, the Commission has included in its Freedom of Information Act rules, a provision which quite properly recognizes that duly authorized congressional committees and subcommittees have access to all Commission records:

All records of the Commission shall be disclosed to Congress upon a request made by the chairman of a committee or subcommittee of Congress acting pur-

¹⁴⁶ 16 C.F.R. 1015.15(c), 41 Fed. Reg. 16578 (1976).

¹⁴⁷ *Hearings* at 78-79. Representative Collins also criticized the Commission for this policy. *Id.* at 80.

¹⁴⁸ *Hearings* at 78-79. Commissioner Pittle, generally an advocate of agency openness, has noted that in disclosing such memoranda, "the Commission crosse[s] the dividing line between 'openness' and 'nakedness.'" *Id.* at 318; *see id.* at 42.

¹⁴⁹ *See, e.g., Hearings on S. 644 and S. 100 Before the Subcomm. for Consumers of the Senate Comm. on Commerce*, 94th Cong., 1st Sess., Serial No. 94-12, at 149-50 (1975) (testimony of Professor Joseph A. Page).

suant to committee business and having jurisdiction over matters about which information is requested.¹⁵⁰

The Commission has carefully adhered to this provision. The Subcommittee has been able to obtain any Commission records it has sought in connection with its oversight responsibilities.¹⁵¹

2. *Independence.*—The Commission has been generally successful in maintaining the independence Congress sought to confer. There is no evidence that the Commission is subject to undue influence by any of the regulated industries.¹⁵² Even attempts to influence the agency politically have been infrequent and unsuccessful. No doubt the consumer participation provided by the statute and the open policy adopted by the Commission have been substantial factors in the Commission's independence. Because the Commission is young, however, Congress should continue to be vigilant to ensure that the Commission does not fall prey to the industry or become a political captive like so many older regulatory agencies.

(a) *NEA political clearance.*—Symbolic of the Commission's resistance to outside political pressure was its refusal to submit its noncareer executive appointments (NEAs)¹⁵³ to White House approval. The Commission and the White House have remained at loggerheads on this question for many months.¹⁵⁴ At the Commission's request, Congress recently amended the Consumer Product Safety Act to prohibit Presidential clearance of any Commission officer (other than a Commissioner) or employee.¹⁵⁵ The House report accompanying that legislation made it clear that such political clearance has no place in an independent agency:

In writing the Consumer Product Safety Act, the Congress took considerable care to see that the Consumer Product Safety Commission became a truly independent Commission, free from political pressure and influence. However, in the two years of its existence, the Commission has been subjected to one form or political pressure which the Congress did not anticipate. The Civil Service Commission refused to approve noncareer executive appointments of the Commission until the appointment was submitted to and received political approval from the White House. Such political clearance is totally inappropriate for an independent regulatory agency.¹⁵⁶

¹⁵⁰ 16 C.F.R. 1015.12(a).

¹⁵¹ The Commission's policy on contacts between congressional investigators and Commission personnel, set out in a letter from the Commission Chairman to the Subcommittee Chairman, reprinted in *Hearings* at 407, generally provides for free access.

¹⁵² As a horizontal agency, see note 97 *supra*, the Commission is less vulnerable to industry "capture" than are vertical agencies which deal continuously with the same industry.

¹⁵³ There were five positions at issue: Executive Director, General Counsel, Director for Public Affairs, Director of Compliance, and Director of Congressional Relations.

¹⁵⁴ During this time the Senate Committees on Commerce and Government Operations explored the problem in some detail. See *Joint Hearings on Consumer Product Safety Commission Oversight Before the Senate Comm. on Commerce and the Senate Comm. on Government Operations*, 93d Cong., 2d Sess., Serial No. 93-100 (1975).

¹⁵⁵ 15 U.S.C. 2053(g)(4), added by P.L. No. 94-284.

¹⁵⁶ H. Rep. No. 325, 94th Cong., 1st Sess., 16 (1975). The Conference Report noted that the provision "once again expresses Congressional intent that this Commission be an independent regulatory agency unfettered by political influence. Appointments of officers or employees of the Commission shall be based only on professional merit and qualification." H. Rep. No. 1022, 94th Cong., 2d Sess., 17 (1976).

The conferees recommended the creation of a special category of non-career executive assignment (NEA) positions for independent agencies. *Id.* at 18. (For a discussion of NEAs and their use in the federal government, see the case study on the White House Personnel Office in Chapter 2, the Securities and Exchange Commission.)

A similar policy is embodied in our recommendations on this subject in Chapter 2 (SEC).

(b) *Political review of the budget.*—In spite of the clear language of section 27(k)¹⁵⁷ of the CPSCA establishing a direct line of communication between the Commission and the Congress, the Office of Management and Budget has sought to interpose itself. The Commission quite correctly has resisted.

Section 27(k) expressly prohibits OMB from interfering in any way with the Commission's ability freely to convey its budgetary and legislative recommendations to Congress:

(1) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of that estimate or request to the Congress.

(2) Whenever the Commission submits any legislative recommendations, or testimony, or comments on legislation to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

OMB has sought to countermand this clear congressional mandate pursuant to its authority under 31 U.S.C. 15¹⁵⁸ and the implementing circular, OMB Circular A-10. It has directed the Commission to support the budgetary recommendations of OMB. For example, in a letter dated February 11, 1976, the Deputy Director of OMB advised the Commission Chairman:

The President expects each official in the Commission to support actively the budget amounts set forth in this letter and its enclosures. This support should be given in testimony before Congressional committees, in informal contacts with members of Congress and their staffs, and in speeches and meetings with outside groups.¹⁵⁹

Such directives from OMB are inappropriate, as Section 27(k) makes 31 U.S.C. 15 inapplicable to the CPSC.¹⁶⁰ Being so advised by its general counsel,¹⁶¹ the Commission has acted accordingly. In response to the Subcommittee's written questions, the Commission Chairman stated:

I have not * * * adhered to the [February 11, 1976] instruction from OMB * * *. I have consistently supported before the appropriate committees

¹⁵⁷ 15 U.S.C. 2075(k).

¹⁵⁸ 31 U.S.C. 15 provides: "No estimate or request for an appropriation and no request for an increase in an item of any such estimate or request, and no recommendation as to how the revenue needs of the Government should be met, shall be submitted to Congress or any committee thereof by any officer or employee of any department or establishment, unless at the request of either House of Congress."

¹⁵⁹ *Hearings* at 157. The complete letter appears in 122 Cong. Rec. E 608 (daily ed. Feb. 11, 1976) (remarks of Rep. Moss).

¹⁶⁰ It is a standard rule of statutory construction that, when two statutes appear to conflict, the one later enacted repeals *pro tanto* the earlier one, and the legislative history of section 27(k), enacted 50 years after 31 U.S.C. 15, shows clearly that Congress intended it to have such an effect. See S. Rep. No. 835, 92d Cong., 2d Sess. 10 (1972) (provision "will ensure that the Congress receives the undiluted judgment of the [Commission] concerning [its] budget needs"). Alternatively, section 27(k) may be regarded as a standing "request" from Congress as that term is used in 31 U.S.C. 15.

¹⁶¹ *Hearings* at 160.

of the Congress my best estimate of an adequate level of funding for this agency as required by the Consumer Product Safety Act. This figure has been at variance with the Administration's request in both fiscal year 1976 and 1977.¹⁶²

The Subcommittee commends the Commission for resisting OMB's attempt improperly to intervene in its communications with the Congress. We will continue to support the Commission in its efforts to conform fully to the letter and spirit of section 27(k). Our recommendation in Chapter 17 addresses this subject with respect to all independent agencies.

While Section 27(k) no doubt has enhanced the Commission's independence, it may have had an adverse effect on the Commission's budget.¹⁶³ The Commission suggests that, by circumventing OMB, section 27(k) robs the Commission of OMB's support in the budget process but fails to provide alternative support:

Understandably, the reaction from the Executive Branch has been negative. The agency, as it attempted to administer the statute under which it was created, has been looked upon as a maverick and an upstart. The provision itself threatens the control of the budget which rests with OMB as a result of the Budget and Accounting Act of 1921.

On the other hand, we have had difficulty explaining to members and their staffs why we were submitting two budgets and what the two sets of figures represented.¹⁶⁴

The result, says the Commission, is that while its independence is protected, it does not have the political base necessary to obtain sufficient funding:

While the provision has certainly added to the agency's independence, it is a fact of life that support must come from somewhere outside the agency if adequate funding is to become a reality.¹⁶⁵

Part of the difficulty is that Section 27(k) was unique. The Commission was the first agency to operate under such a provision.¹⁶⁶ In order for the provision to work properly, the budget process will have to adapt to it, and that may take time. Thus, the Subcommittee agrees with the Commission Chairman that:

It is not possible, with only a few years of experience, to determine with any certainty whether the provisions of section 27(k) (1) can or will work in a productive manner in the long term.¹⁶⁷

It is clear, however, that alternative political support in the budget process must be found to replace the support of OMB. The likely source of that support is the Congress, as the Commission Chairman correctly pointed out:

[S]ection 27(k) (1) places a burden on the Congress to provide the kind of support that may well be lost from OMB * * *.¹⁶⁸

¹⁶² *Hearings* at 157.

¹⁶³ *Hearings* at 14-15, 27-28 (testimony of Chairman Simpson).

¹⁶⁴ *Hearings* at 155 (Commission's response to Subcommittee's written questions).

¹⁶⁵ *Id.* (Commission's response to Subcommittee's written questions).

¹⁶⁶ "A large part of the problem, I feel quite certain, stems from the fact that we were for a time the only agency of the government with this unique budget requirement, and our actions with respect to budget requests and justifications were not widely understood." *Id.* (Commission's response to Subcommittee's written questions). Three other government agencies now have provisions similar to § 27(k): Commodities Futures Trading Commission, P.L. 93-463, § 101; Privacy Protection Study Commission, P.L. 93-579, § 5(a)(3); National Transportation Safety Board, P.L. 93-633, § 304(b) (7).

¹⁶⁷ *Id.* (Commission's response to Subcommittee's written questions).

¹⁶⁸ *Id.* (Commission's response to Subcommittee's written questions). As former Federal Trade Commissioner Philip Elman has pointed out, independence without political support is a source of weakness, not strength. Elman, "A Modest Proposal for Radical Reform," 56 A.B.A.J. 1045, 1047 (1970).

It can be anticipated that as provisions similar to section 27(k) come to be applied to other agencies,¹⁶⁹ and the newness of the concept of direct submission to Congress wears off, this political support will be forthcoming. Also, as the Commission compiles a record of achievement, it is likely to acquire sufficient funds. Nevertheless, the effect of Section 27(k) on the Commission's ability to secure adequate funding needs to be carefully monitored. In the event the section continues to affect the Commission adversely, remedial legislation may have to be considered.

(c) *Prohibition on subsequent employment in regulated industry.*—In order to prevent the revolving door syndrome and the potential for conflict of interest it brings with it, Congress barred Commissioners and high-level Commission officers and employees from seeking employment with regulated manufacturers or importers for one year after leaving the Commission:

No full-time officer or employee of the Commission who was at anytime during the 12 months preceding the termination of his employment with the Commission compensated at a rate in excess of the annual rate of basic pay in effect for grade GS-14 of the General Schedule, shall accept employment or compensation from any manufacturer subject to this Act, for a period of 12 months after terminating employment with the Commission.¹⁷⁰

The Commission's program for implementing this provision consists solely of notifying departing employees of the obligation the statute places on them:

The Commission considers the effort of informing the employees of their responsibilities under the Act to be adequate to ensure compliance.¹⁷¹

There is no compliance monitoring:

There are no periodic checks. Any impropriety would most likely reach the Commission through word of mouth.¹⁷²

Nor does the Commission plan to institute any compliance monitoring program:

The Commission does not contemplate instituting any additional action at this time to ensure compliance with this statutory requirement.¹⁷³

The Subcommittee considers the Commission's effort inadequate. Compliance monitoring of all employees subject to this requirement would not be burdensome: there are only a few employees above grade GS-14; the time period of one year during which monitoring would be necessary is short. Written statements from employees upon their departure and perhaps once during the ensuing year as to the nature of their new employment could easily be obtained.

3. *Consumer participation.*—In keeping with the clearly expressed mandate of Congress that consumers have an active role in Commission decision-making, the Commission has generally encouraged public participation and has developed some novel programs to that end.

¹⁶⁹ S. 3308, 94th Cong., 2d Sess., § 7 (1976) (Interim Regulatory Reform Act of 1976). The Senate Committee on Commerce reported the bill in S. Rep. No. 838, 94th Cong., 2d Sess. (1976), and the bill was passed by the Senate on May 19, 1976.

¹⁷⁰ Section 4(g)(2), 15 U.S.C. 2053(g)(2).

¹⁷¹ *Hearings* at 168. (Commission's response to subcommittee's written questions).

¹⁷² *Hearings* at 168. (Commission's response to question 17 of Subcommittee questionnaire).

¹⁷³ *Hearings*, at 168. (Commission's response to Subcommittee's written questions). It should be noted, however, that because a violation of section 4(g)(2) is not made a prohibited act by section 19, 15 U.S.C. 2068, the Commission may be powerless to bring a criminal enforcement action against a violator.

(a) *Advisory committees.*—The Commission has three advisory committees,¹⁷⁴ all statutory:¹⁷⁵ the Product Safety Advisory Council, established by the Consumer Product Safety Act;¹⁷⁶ the Technical Advisory Committee on Poison Prevention Packaging, established by the Poison Prevention Packaging Act;¹⁷⁷ and the National Advisory Committee for the Flammable Fabrics Act, established by the Flammable Fabrics Act.¹⁷⁸ The consumer membership of the Product Safety Advisory Council is fixed at one third by the Consumer Product Safety Act.¹⁷⁹ The Commission has adopted a policy requiring that one-half of the membership of each of the other advisory committees be representative of consumer interests.¹⁸⁰ In filling positions on these advisory committees, the Commission widely publicizes the existence of a vacancy, through media such as press releases and Federal Register notices. Also, it allows prospective members to nominate themselves for membership.¹⁸¹

Unfortunately, the Commission has not permitted advisory committees to live up to their potential as an avenue for consumer contributions to Commission decision-making. Consumer representatives selected often have had little expertise in consumer affairs; they were consumers, rather than the consumer leaders contemplated by the Consumer Product Safety Act.¹⁸² The advisory committees meet too infrequently to have significant influence on decisionmaking.¹⁸³ Perhaps because of their composition, the Commission has not viewed the advisory committees as important sources of facts or ideas for shaping policy.

(b) *Standards development.*—Consumers may be active in standard development under the CPSA in at least two ways: As the "offeror" or manager of the standard development committee, or as a participant on the committee. The Commission's stated policy is to encourage both types of participation:

Since safety standards are intended to eliminate or reduce unreasonable risks of injury associated with consumer products, the Commission * * * seeks the involvement of all interested persons, the general public, and especially ultimate

¹⁷⁴ The Commission has wisely adopted a policy against the proliferation of advisory committees commonly found in other government agencies. See 16 C.F.R. 1018.3(a), 1018.13(b), 1018.14(a).

¹⁷⁵ The Federal Advisory Committee Act requires that any advisory committee established by statute, 5 U.S.C. App. I, § 9(a)(1), established by the President, *id.*, or determined as a matter of formal record by the head of the agency to be in the public interest, 5 U.S.C. App. I, § 9(a)(2). All three of the Commission's advisory committees are established by statute. For a more complete description of the committee, see Hearings at 226 (Commission response to question 55 of Subcommittee questionnaire). That response also contains information concerning other groups whose expertise the Commission draws upon but which are said not to be "advisory committees" as that term is used in the Federal Advisory Committee Act, 5 U.S.C. App. I.

¹⁷⁶ Section 28, 15 U.S.C. 2077.

¹⁷⁷ Section 6, 15 U.S.C. 1475.

¹⁷⁸ Section 17, 15 U.S.C. 1204.

¹⁷⁹ Section 28(a), 15 U.S.C. 2077(a).

¹⁸⁰ Hearings at 9, 25.

¹⁸¹ Hearings at 9, 25. See, e.g., 41 Fed. Reg. 11348 (1976) (notice inviting application for membership on National Advisory Committee for the Flammable Fabrics Act and the Technical Advisory Committee on Poison Prevention Packaging). This public notice is required by the Commission rules on advisory committees, 16 C.F.R. 1018, 15(a).

¹⁸² There is occasionally doubt as to whether the consumer representatives speak for consumers. One "consumer representative" testified at a congressional hearing on behalf of the National Small Business Association. See Hearings on H.R. 5361 and H.R. 6107 Before the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce, 94th Cong., 1st sess., Serial No. 94-30, at 269-71 (1975).

¹⁸³ The Product Safety Advisory Council is the only advisory committee for which there is a statutory minimum for the number of annual meetings. The CPSA requires the committee to meet "not less often than four times during each calendar year." Section 28(b), 15 U.S.C. 2077(b). That requirement is a minimum, however, and it is inadequate to ensure significant policy input.

consumers. Ultimate consumers and their representatives, as well as all other interested persons, are invited and encouraged to become involved by submitting offers to develop standards and by participating in the development of standards by other offerors.¹⁸⁴

Participation in either capacity is expensive. Thus, the degree of participation by a consumer depends in no small part on the amount of this expense the Commission is willing and able to absorb.

The more costly form is participation as an offeror. The offeror incurs substantial administrative costs. In addition, the offeror is required to ensure satisfactory consumer participation. Although the regulation states that the Commission "may contribute to the costs of assuring adequate consumer participation in the development of the standard,"¹⁸⁵ present policy assumes that consumer participants will volunteer, so the Commission allows reimbursement only to cover the consumer's out-of-pocket costs.¹⁸⁶ If additional expenditures (for salaries, for example) are required to obtain consumer participation, the offeror must underwrite them.

While industry offerors typically can afford these costs (it is, in fact money well spent from their standpoint), consumer offerors generally cannot. It is not surprising that of the seven standards developed or being developed under the CPSC, only one, the power lawnmowers standard, has had an offeror which could be characterized as a consumer group, Consumers Union, an organization which, as consumer groups go, has been financially successful. Even Consumers Union has expressed doubts about whether it could ever again afford to be an offeror under present Commission policy:

The financial loss that Consumers Union has sustained as a result of serving the CPSC as offeror is a matter of grave concern to us for two reasons, both of which should concern the Commission as well. First, the unreimbursed costs of the lawn mower project and the limitations on Consumers Union's financial resources make it most unlikely that it could again undertake any similar effort. * * *

Second, Consumers Union's experience, while unique because of the distinctive and unprecedented nature of the lawn mower standard development process, is likely to be shared by other non-industry offerors as well. In particular, such offerors may well incur unanticipated but significant and unavoidable costs, both during and subsequent to the submission of the proposed standard by the offeror.

The continuing responsibilities intrinsic to service as an offeror have very serious implications for the offeror process as a whole. Clearly, other potential consumer or "public interest" offerors, few of whom possess even the limited resources of Consumers Union, will be deterred if the process is likely to produce a loss. Since Consumers Union was the first non-industry group to serve as a sole offeror, its experience as offeror is certain to be watched closely by other potential offeror organizations.¹⁸⁷

Consumers Union foresaw the Commission's policy on reimbursement of offerors as leading to a situation where only industry groups would be offerors:

Without adequate reimbursement of consumer group offerors with demonstrated technical competence, only well-financed industry groups will seek to

¹⁸⁴ 16 C.F.R. 1105.1(d). See generally 16 C.F.R. 1105.1.

¹⁸⁵ 16 C.F.R. 1105.9(f).

¹⁸⁶ The policy was articulated in the decision involving the breaking off of negotiations with the National Consumer League, reprinted in *Hearings* at 342. It is also reflected in the Commission's regulations. See 16 C.F.R. 1105.9(g)(2). See also *Hearings* at 86.

¹⁸⁷ Letter from Rhoda H. Karpatkin, Executive Director of Consumers Union, to Sadye Dunn, Secretary, CPSC, dated January 9, 1976, reprinted in *Hearings* at 364. Another non-industry offeror, the American Society for Testing Materials which developed the book matches standard, has indicated it will require total reimbursement if it is again to act as an offeror. *Hearings* at 34 (testimony of Commissioner Pittle).

become offerors, thus leading to industry domination of the process, a result that manifestly contradicts the will of Congress and the oft-expressed intent of the Commission.¹⁸⁸

Participation by consumer groups as offerors is absolutely crucial, for the offeror has the strongest hand on the development committee in shaping the final standard.¹⁸⁹ Allowing offerors to become exclusively industry groups will bring about a situation where, in Commissioner Pittle's words, "industry * * * provide[s] first drafts of standards for the Commission to evaluate and modify."¹⁹⁰ Such a result is not in keeping with Congress' clear intent that consumers be actively involved in all phases of standard development, and that the Commission be independent of the industries it regulates.

There also is some question whether consumer participants on the development committee are sufficiently expert or well funded to be vigorous advocates for their point of view. The writing of standards usually requires both academic and practical knowledge of the technology and trade practices of the industry. Consumer participants rarely possess such expertise, compared to the representatives of those regulated.¹⁹¹ Such expertise could be summoned if consumer participants were able to employ technical consultants, but present Commission policy does not provide funding sufficient to do so.

(c) *Funding of consumers outside the offeror process.*—The Commission has properly assumed it has inherent authority to fund consumer participation not only in standard setting but in other Commission proceedings, such as the Fireworks Devices rulemaking,¹⁹² engaging a number of consumer groups, all based in Washington, D.C. When the Administrative Law Judge determined that it would be necessary temporarily to move the hearings to other parts of the country to ensure the building of a complete record, the Commission granted the request of one of the consumer groups that the Commission pay expenses for attendance at these hearings of a representative of those groups.¹⁹³

The Comptroller General, in an opinion requested by the Subcommittee Chairman, has confirmed the Commission's position that it has authority to fund public participants in appropriate cases.¹⁹⁴ In commenting on the Comptroller General's opinion the Commission stated:

In situations where the Commission has determined that participation of particular parties in its proceedings would be necessary for a full and fair determination of the matter under consideration, the Commission has authorized the use of Commission funds to pay costs associated with the appearance of such parties who could not otherwise participate * * *. The Commission agrees with the Deputy Comptroller General that such payment of costs is authorized whenever necessary and proper to the execution of the Commission's responsibilities under the Acts which it administers.¹⁹⁵

¹⁸⁸ Letter from Rhoda H. Karpatkin, Executive Director of Consumers Union, to Sadye Dunn, Secretary, CPSC, dated January 9, 1976, reprinted in *Hearings* at 365.

¹⁸⁹ *Hearings* at 71-72, 85-86 (testimony of Chairman Simpson). Under the Commission's rules an offeror may reject the views of all other participants on the committee as long as it explains its reasons. 16 C.F.R. 1105.7.

¹⁹⁰ *Hearings* at 35.

¹⁹¹ *Hearings* at 35-36 (testimony of Commissioner Pittle).

¹⁹² Docket No. CPSC 74-3.

¹⁹³ See *Hearings on Regulatory Reform Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce*, 94th Cong., 2d sess., Vol. V, Serial No. 94-84, at 477-478 (1976).

¹⁹⁴ Letter to Subcommittee Chairman John E. Moss from Deputy Comptroller General R. P. Keller, dated May 10, 1976 (B-180224), reprinted in Appendix D(2) to this report.

¹⁹⁵ Letter to Rallee Lowenstein, Assistant General Counsel, General Accounting Office, from Chairman Byington, dated June 18, 1976, reprinted in *id.* at 476.

The Consumer Product Safety Act contains no criteria for determining when funding of consumer participants is appropriate. The Commission has promulgated no rules setting out such criteria, choosing instead to decide each case on its own merits. The Commission now has before it a rulemaking petition seeking a regulation providing for funding of consumer participants.¹⁹⁶ That petition, or a similar rulemaking instituted by the Commission on its own motion, would offer a chance to consider a consistent system of funding consumers.

(d) *Citizen petitions.*—The Commission has accorded citizen petitions, both those under Section 10 of the CPSA¹⁹⁷ and those under the transferred Acts, careful and detailed consideration.¹⁹⁸ This consideration ensures that the voice of citizen petitioners is heard by the agency. Former Chairman Simpson's protestations to the contrary notwithstanding, citizens have not made frequent use of the right to petition, particularly the right under Section 10.

Section 10 creates a right for any interested person to petition the agency for the issuance of a consumer product safety rule,¹⁹⁹ to receive an answer to the petition, including an explanation by the Commission justifying its answer, in 120 days,²⁰⁰ and to seek judicial review of the Commission's decision.²⁰¹ The reviewing court may compel the Commission to commence the proceeding requested by a denied petition upon a finding that the consumer product which is the subject of the petition "presents an unreasonable risk of injury, and that the failure of the Commission to initiate a rulemaking procedure under section 7 or 8 unreasonably exposes the petitioner or other consumers to a risk of injury presented by the consumer product * * *."²⁰²

Although the Commission has faithfully executed its responsibilities to ensure the right of consumers to petition the agency, former Chairman Simpson was highly critical of the provision which establishes that right. His position at the Subcommittee's hearings was that this provision requires the Commission to grant any petition concerning a product which presents an unreasonable risk of injury, regardless of how that risk or injury compares with those presented by other products subject to Commission jurisdiction. The result, he argued, is a serious impairment of the Commission's ability to set its own priorities.²⁰³

In actuality, the Commission has received few petitions under Section 10.²⁰⁴ Moreover, Chairman Simpson's view that its priorities are not pertinent to the decision on a petition is surely erroneous. The Subcommittee was highly critical of the interpretation,²⁰⁵ as was the Sen-

¹⁹⁶ Petition No. AP-76-1.

¹⁹⁷ 15 U.S.C. 2059.

¹⁹⁸ *Hearings* at 13, 27, 93.

¹⁹⁹ Section 10(a), 15 U.S.C. 2059(a). A "consumer product safety rule" is defined in Section 3(a)(2), 15 U.S.C. 2052(a)(2), as either a product safety standard under Section 7(a), 15 U.S.C. 2056(a), or a hazardous product ban under Section 8, 15 U.S.C. 2057.

²⁰⁰ Section 10(d), 15 U.S.C. 2059(d).

²⁰¹ Section 10(e), 15 U.S.C. 2059(e).

²⁰² Section 10(e)(2), 15 U.S.C. 2059(e)(2).

²⁰³ *Hearings* at 12-14, 27, 91 (testimony of Chairman Simpson). The Commission has not, however, adhered unwaveringly to this interpretation of Section 10. In at least one instance it has denied a petition involving a low priority product hazard. In denying CP 73-4, pertaining to fondue pots, it noted: "[T]he Commission concludes that its resources should be applied to products causing more frequent and severe injuries than fondue pots" 38 Fed. Reg. 31753 (1973).

²⁰⁴ *Hearings* at 12, 92.

²⁰⁵ *Hearings* at 91-94 (questioning by Rep. Maguire and Subcommittee staff counsel).

ate Committee on Appropriations.²⁰⁶ Commissioner Pittle also took issue with Chairman Simpson's view:

While I agree that an argument can be made in support of the Chairman's position, I do not find it particularly convincing nor do I see any reason for adopting such a self-defeating approach absent a conclusive judicial determination on the point * * *

I strongly agree with the argument that a determination that a product presents an "unreasonable risk of injury" must involve a consideration of CPSC priorities and resources.²⁰⁷

Since the time of the Subcommittee's hearings, the Commission has made clear that it does not subscribe to Chairman Simpson's interpretation. It has begun consideration of a policy for dealing with petitions. The criteria to be applied in deciding on petitions set out in that policy will include a regard for the Commission's priorities and the degree of unreasonableness of the hazard presented. Although the Subcommittee firmly believes that CPSC priorities must play a role in any decision on petitions, that role must not, of course, be allowed to vitiate the right of citizen petition itself. Ensuring that the voice of citizens is heard and allowed to play a role in Commission decision-making without being permitted grossly to distort Commission priorities will require careful and sensitive attention by the Commission to both petitioner and public obligations.

Although the Commission has properly accorded careful consideration to the citizen petitions it has received, its response to these petitions has often not been timely. While only petitions under the CPSCA have the benefit of a specific statutory time limit (120 days), the agency has an obligation, deriving from the requirement in the Administrative Procedure Act that "within a reasonable time, each agency shall proceed to conclude a matter presented to it,"²⁰⁸ to respond in a timely fashion to all petitions. The Commission has not only frequently failed to meet the 120-day deadline for CPSCA petitions, but it has also been extremely slow to respond to petitions submitted under the transferred acts.

(e) *Consumer Deputy Programs.*—One of the more innovative programs the Commission has devised for increasing the participation of consumers in CPSC activities is the Consumer Deputy Program. Citizen volunteers are trained by Commission staff to survey the products in retail establishments. While this program does not provide consumers with a direct share in Commission decision-making, it does help them to exercise a public responsibility with a sense of direct participation in government affairs.²⁰⁹ This program has the further

²⁰⁶ S. Rep. No. 974, 94th Cong., 2d Sess. 28-29 (1976). The Chairman of the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce, the Subcommittee which wrote the Consumer Product Safety Act, also voiced disagreement with the Commission's position: "There is nothing in the language of the bill or in the legislative history which would indicate that the Commission is precluded from setting priorities and basing denials on the frequency and severity of injury. A responsible administrator would be expected to do precisely this." *Id.* at 29.

²⁰⁷ *Hearings* at 38. Commissioner Franklin was of a similar view. *Id.* at 47 ("I do not believe the law inhibits our flexibility to deny petitions if the result of granting them would be an unwise use of scarce resources"). See *Hearings* at 32 (testimony of Commissioner Newman that mechanisms for dealing with the petition problem must be "short of abolishing" the right of citizens to petition); *id.* at 46-47 (testimony of Commissioner Franklin).

²⁰⁸ 5 U.S.C. 555(h).

²⁰⁹ *Id.* at 9, 25. A more complete description of the Consumer Deputy Program, prepared by the Commission, appears in *id.* at 377 (Appendix I).

advantage of augmenting the Commission's small resources where most needed, in compliance and enforcement programs.²¹⁰

C. UNFINISHED BUSINESS

1. *Unused powers.*—The Commission has yet to make full use of the many powers Congress conferred under the CPSA and the transferred acts.

(a) *Information-gathering powers.*—As previously noted, the Commission has a variety of powers to obtain the information it needs for sound regulation of product safety. A number of these powers have never been used or have been used infrequently and unimaginatively.

For example, section 16(b)²¹¹ of the CPSA requires manufacturers to keep records. The statute is not self-implementing; it requires the Commission to promulgate rules specifying the kinds of records to be kept. The Commission initiated a rulemaking under this section in the fall of 1974.²¹² Although the comment period for the rule proposed at that time has long since ended, the rule has not been promulgated. The Commission Chairman testified that the proposed rule was "so controversial" that the Commission had decided to repropose it for comments rather than to promulgate it in final form.²¹³ More than 6 months later the rule still has been neither promulgated nor repropounded. In fact, it is not now even under active consideration by the Commission.

The Commission's extraordinary power under section 27(b)(1) of the Act²¹⁴ to require, merely by order, any person to submit such reports and provide answers to such questions as the Commission deems appropriate has been used only twice. In one of those instances, the subject of the order contested it. Both a Federal district court and a Federal court of appeals upheld the Commission's action.²¹⁵ In fairness to the Commission, it should be noted that the mere fact that the Commission has this potent weapon in its arsenal may enable it to obtain needed information from manufacturers informally.

The Commission has never promulgated rules implementing its power under section 27(e)²¹⁶ to require manufacturers to provide performance and technical data. It should be noted, however, that the Commission's information gathering power under Section 27(b)(1) is at least as broad as that under this provision, and that section has the advantage of allowing the Commission to require the submission of information by order rather than by rule.

An important power as yet dormant is the Commission's authority under Section 13 of the CPSA²¹⁷ to promulgate rules requiring manufacturers of new consumer products to furnish notice and a description of the product to the Commission prior to its distribution in

²¹⁰ *Id.* at 65 (testimony of Chairman Simpson).

²¹¹ 15 U.S.C. 2065(b).

²¹² 39 Fed. Reg. 31916 (1974).

²¹³ *Hearings* at 131.

²¹⁴ 15 U.S.C. 2076(b)(1).

²¹⁵ *Chemical Specialties Mfrs. Ass'n v. Consumer Product Safety Comm'n*, Civil Action No. 75-2064 (D.C. Cir. Nov. 18, 1974). *aff'd* Civil Action No. 75-1722 (D.D.C., Nov. 3, 1975). Chairman Simpson referred to this case as a "landmark decision" in his testimony before the Subcommittee. *Hearings* at 5, 24. The Commission's order appears at 40 Fed. Reg. 36617 (1975).

²¹⁶ 15 U.S.C. 2076(e).

²¹⁷ 15 U.S.C. 2062.

commerce has never been used. The Commission has been considering rules under this section for more than a year. To date, no such rules have been proposed.

(b) *Imminent Hazard Authority.*—The Commission has used its authority under Section 12 of the CPSA ²¹⁸ to move against imminently hazardous consumer products only once. The imminent hazard power granted by the Federal Hazardous Substances Act,²¹⁹ which, because it allows the Commission to act administratively rather than through judicial proceedings, provides an even more expeditious remedy, has also been used only once. The imminent hazard authority conferred by the Child Protection and Toy Safety Act ²²⁰ has never been used. Although it is true that the imminent hazard authority is not to be used lightly, the Commission's use has been far from excessive. Indeed it is astonishing that this Commission, charged with imposing Federal regulation on hazards which previously had been virtually unregulated, would find only two occasions in 3 years to use that power.

(c) *Standard setting.*—As previously noted, the Commission has not used its various standard setting and banning authorities extensively. Of particular note, the Commission has been reluctant to use the expeditious procedures of the Child Protection and Toy Safety Act, contained in the Federal Hazardous Substances Act.²²¹

(d) *Powers to provide consumers with information on comparative safety of specific consumer products.*—The Commission now conducts no programs which would make available to consumers comparative information on the safety of specific products. Yet one of the four purposes of the Consumer Product Safety Act is "to assist consumers in evaluating the comparative safety of consumer products * * *."²²² There are at least two ways the Commission could cause this information to be made available.

First, the Commission itself could devise and conduct testing programs of specific products. There can be no doubt that the Commission has authority to do such testing. It is empowered by Section 5 to (1) Conduct research, studies, and investigations on the safety of consumer products and on improving the safety of such products; [and to] (2) list consumer products and develop product safety test methods and testing devices * * *.²²³

That Congress contemplated that this power encompassed authority to test specific market products is made clear by Section 27(f), which authorizes the Commission to purchase "any consumer product."²²⁴ The Commission could, of course, publish the results of the testing under section 6.²²⁵

²¹⁸ 15 U.S.C. 2061.

²¹⁹ Section 2(q)(2), 15 U.S.C. 1261(q)(2).

²²⁰ Section 3(e)(2), 15 U.S.C. 1262(e)(2).

²²¹ Section 3(e)(1), 15 U.S.C. 1262(e)(1). The views of Commissioner Pittle, who has been critical of the Commission's failure to make more frequent use of this authority, appear in detail in Hearings at 310-14, 381-407. The similar views of Commissioner Franklin are set out in her dissenting opinion in *In re Little People Kites, et al.*, CPSC Docket No. 75-15.

²²² Section 2(b)(2), 15 U.S.C. 2051(b)(2).

²²³ Section 5(h), 15 U.S.C. 2054(b).

²²⁴ 15 U.S.C. 2076(f).

²²⁵ 15 U.S.C. 2055.

Second, under Section 27(e) the Commission could require manufacturers to conduct the testing and themselves publish the results.²²⁶ Although this power has never been used, it has vast potential. In some instances, it may offer a much less costly and less burdensome alternative to standard setting.

Industry spokesmen frequently claim that consumers will not pay for safety, that the economic incentives on the market run the other way. The truth of this claim never has been tested, because there is little solid data on the comparative safety of competing products. Were such data available, the information could influence consumer buying decisions.

2. Rules for the guidance of agency action.—The Commission has failed in several respects to promulgate rules that could serve as an internal guide for its own actions and provide strong grounds to sustain agency action on judicial review.

(a) *Summary judgment rules.*—A number of statutes under which the Commission operates require that parties affected be given an opportunity for a hearing in connection with any contemplated agency regulation or action. Some agencies operating under similar statutes have promulgated rules setting out detailed guidelines as to when a hearing should be granted. The Commission has not.

Section 15 of the CPSA requires the Commission to afford interested persons "an opportunity for a hearing" before ordering any of the remedies provided by subsections 15(c) and (d).²²⁷ The Commission has taken the position that the provisions require that a hearing be held:

[I]n any situation in which the Commission wishes to "order" a manufacturer to take remedial action under sections 15(c) or (d) of the Act, the Commission does not have the option of "granting" a hearing under section 15(f). Unless a manufacturer, distributor, or retailer of a consumer product voluntarily agrees to take action requested by the Commission under section 15(c) or (d), a hearing under section 15(f) is a necessary prerequisite for an "order."²²⁸

Other agencies, taking a contrary position, have prevailed when challenged in court. The Food and Drug Administration, for example, has promulgated summary judgment rules setting forth criteria for the denial of a hearing under Section 505(e) of the Federal Food, Drug, and Cosmetic Act.²²⁹ That statute, like section 15 of the CPSA, requires only an "opportunity for hearing." When the FDA's rules were challenged, the Supreme Court sustained them, holding that a

²²⁶ 15 U.S.C. 2076(e). That section provides: "The Commission may by rule require any manufacturer of consumer products to provide to the Commission such performance and technical data related to performance and safety as may be required to carry out the purposes of this Act, and to give such notification of such performance and technical data at the time of original purchase to prospective purchasers and to the first purchaser of such product for purposes other than resale, as it determines necessary to carry out the purposes of this Act."

In discussing the use of the authority granted by this section to require manufacturers to provide information to consumers about the various canning jar lids offered for sale, the Commission's General Counsel has observed:

"[A] rule under section 27(e) could require canning lid manufacturers to provide performance and technical data related to the performance and safety of canning jar lids to consumers at the point of purchase. Although not explicit in section 27(e), it is possible that we could even prescribe the test methods by which the manufacturers would have to measure the performance and safety of their lids. In this manner, we could require labels, tags, stickers or the like in a common format on canning lids or on display at points of sale of such lids." Memorandum to the Commission from General Counsel Michael A. Brown, dated Aug. 16, 1976.

²²⁷ 15 U.S.C. 2064(c), (d).

²²⁸ *Hearings* at 200-01 (Commission response to Subcommittee's written questions).

²²⁹ 21 U.S.C. 355(e). The rules are codified at 21 C.F.R. 130.12(a) (5).

statute conferring an "opportunity" for a hearing does not create a right to a hearing in every case:

What the agency has said, then, is that it will not provide a formal hearing where it is apparent at the threshold that the applicant has not tendered any evidence which on its face meets the statutory standards as particularized by the regulations. . . . We cannot impute to Congress the design of requiring, nor does due process demand, a hearing when it appears conclusively from the applicant's "pleadings" that the application cannot succeed. * * * [W]e find FDA hearing regulations unexceptionable on any statutory or constitutional ground.²³⁰

Congress no more intended "opportunity for a hearing" to mean "right to a hearing" in the Consumer Product Safety Act than it did in the Federal Food, Drug, and Cosmetic Act. The promulgation of summary judgment rules under the CPSA is therefore wholly within the Commission's power.²³¹ Similarly, the Commission has power to issue summary judgment rules under section 2(q)(1)(B) of the Federal Hazardous Substances Act,²³² as it apparently recognizes.²³³

(b) *Imminent hazard definition.*—The CPSA briefly defines an "imminently hazardous consumer product" as a product which presents "imminent and unreasonable risk of death, serious illness, or severe personal injury."²³⁴ The Commission has adopted no regulations elaborating the meaning of this term. Other health and safety regulatory agencies having imminent hazard authority have found it useful to define that authority specifically in a regulation. For example, the Food and Drug Administration has promulgated a rule defining an "imminent hazard" and specifying criteria which the Commissioners will consider in determining whether to invoke the imminent hazard power.²³⁵ Such a rule would have the double effect of providing (a) guidance to Commission officials in the exercise of their regulatory responsibilities and (b) grounds to support a Commission determination in court. Moreover, if carefully drafted, it need not deprive the Commission of the flexibility necessary to the effective use of this important power.

(c) *Environmental rules.*—Although nearly all agencies have promulgated rules to guide them in their responsibilities under the National Environmental Policy Act, the Commission has not done so. In at least one case, this Commission omission has seriously injured an enforcement effort. The repurchase order in the *Pactra* case, concerning aerosol products containing vinyl chloride, was stayed for almost a year because the Commission had failed to make the environmental assessment.²³⁶ Although it is impossible to speculate as to what shape Commission NEPA rules might have taken, we note that the Food and Drug Administration's rules would probably have required an assess-

²³⁰ *Weinberger v. Hynson, Westcott & Dunning, Inc.* 412 U.S. 609, 620, 621, 622 (1973).

²³¹ Although the Food and Drug Administration cited its general rulemaking authority, 21 U.S.C. 371(a), as the statutory basis for its summary judgment rules, such a statutory basis is not necessary. Because summary judgment rules are merely procedural and interpretative, the Commission has inherent authority to issue them. H.R. Rep. No. 325, 94th Cong., 1st Sess. 12 (1975).

²³² 15 U.S.C. 1261(q)(1)(B).

²³³ *Hearings* at 199-200 (Commission's response to Subcommittee's written questions). Commissioner Pittle recommended the adoption of such rules. *Id.* at 42.

²³⁴ Section 12(a), 15 U.S.C. 2061(a).

²³⁵ 21 C.F.R. 3.73. As this rule also applied to the imminent hazard power in the Federal Hazardous Substances Act when it was promulgated, it was transferred to the Commission by section 30(e) of the CPSA, 15 U.S.C. 2079(e), and it therefore now applies to the Commission's exercise of its imminent hazard power under the FHSA.

²³⁶ *Hearings* at 129; *Pactra Industries, Inc. v. Consumer Product Safety Commission*, No. 74-2902 (9th Cir., Dec. 13, 1974). *Pactra* is CPSC Docket Nos. 74-2902, 74-3168.

ment in such a situation.²³⁷ Thus, such rules can provide a useful guide to Commission staff in ensuring adherence to the requirements of NEPA.

In response to written questions from the Subcommittee, the Commission stated that NEPA rules were in preparation:

The Commission has under consideration a formal procedure for meeting the requirements of the National Environmental Protection Act. A final draft is currently being reviewed by staff and will be proposed for Commission action soon. These draft procedures have been used by the staff as a guide in preparing the environmental assessments that have been made.²³⁸

Six months later, however, no such rules have been promulgated, nor are they under active consideration by the Commission.

IV. Case Studies

A. LITIGATION AUTHORITY AND RELATIONSHIP WITH DEPARTMENT OF JUSTICE

In recent years, the tradition that litigation authority should be centralized in and controlled by the Department of Justice has been questioned with increasing frequency. Nowhere has this tradition been challenged as in issues regarding the Consumer Product Safety Commission. The Commission and the Department of Justice have been open and frank in their mutual criticism. At the time the legislation was enacted and during the recent amendment of the Consumer Product Safety Act, the issues were aired thoroughly in the Congress. Accordingly, the Subcommittee has examined the traditional policy of centralizing litigation responsibility in the Department of Justice in light of recent developments and has reviewed the specific allegations by the Commission and the Department.

1. *Legislative background.*—Beginning a little more than 100 years ago, Congress and the President began a series of moves that gradually centralized control of government litigation in the Department of Justice.²³⁹ Although Congress occasionally created exceptions, this policy was assumed generally to be sound. In 1955, the second Hoover Commission concluded that most litigation should be centralized in the Justice Department.²⁴⁰

Since then, support for this policy has gradually eroded, with numerous factors contributing to its fall from favor. One is the highly specialized and complex nature of the facts which, with the advance of technology, have become progressively prominent in litigation. The importance of specialized knowledge and other essentials to the successful enforcement of regulatory programs has made agencies reluctant to delegate prosecutorial discretion to the Justice Department. The resources of the Justice Department itself have been strained by the volume of litigation in recent years.

²³⁷ 21 C.F.R. 6.1(b).

²³⁸ *Hearings* at 198.

²³⁹ A brief history of the development of the role of the Department of Justice in controlling litigation appears in a Justice Department memorandum which is reprinted in 118 Cong. Rec. 21882-85 (1972).

²⁴⁰ United States Commission on Organization of the Executive Branch of the Government, Task Force on Legal Services and Procedure, *Report on Legal Services and Procedure* 41 (1955) (Second Hoover Commission Report).

Consequently, agencies have begun to request, and Congress on occasion has granted broadened responsibilities for litigation, particularly civil litigation.

During consideration of the Consumer Product Safety Act, the question of the proposed Commission's litigation authority was debated at some length.²⁴¹ As eventually enacted, the Consumer Product Safety Act gave the Commission control only of actions involving imminent hazards brought under Section 12.²⁴²

While the Commission was authorized to represent itself in all litigation, the statute required the concurrence of the Attorney General, thus retaining control in the Department of Justice. The principal such provision was Section 27(b)(7), which provided the Commission shall have power

to initiate, prosecute, defend, or appeal any court action in the name of the Commission for the purpose of enforcing the laws subject to its jurisdiction, through its own legal representative with the concurrence of the Attorney General or through the Attorney General. . . .²⁴³

Pursuant to this provision, the Commission worked out an arrangement whereby the Justice Department agreed to consent to the Commission's filing of any cases which the Department declined to file.²⁴⁴

Although the language of Section 27(b)(7) is not absolutely clear,²⁴⁵ it seems that Congress did intend to cover both civil and criminal litigation by this provision.²⁴⁶

The Commission found that the authority granted by Section 27(b)(7), even in conjunction with the Justice Department's agreement not to exercise absolute control over the Commission in civil matters, was not sufficient. Consequently it asked Congress to enlarge this litigation authority. Once again Congress weighed possible effects of decentralizing the government's litigation authority. In addition,

²⁴¹ See, e.g., 118 Cong. Rec. 21880-89 (1972).

²⁴² 15 U.S.C. 2061. Under the Flammable Fabrics Act, responsibility for which was transferred to the Commission by the CPSC, the Commission has been given authority also to institute proceedings with its own counsel for the seizure of products violating the Flammable Fabrics Act, 15 U.S.C. 1195(b), and to institute proceedings for the issuance of a temporary injunction of alleged violations of the FFA pending the outcome of administrative proceedings, 15 U.S.C. 1195(a).

²⁴³ 15 U.S.C. 2076(b)(7). A similar provision, pertaining to injunctive enforcement actions, was contained in Section 22:

"The United States district courts shall have jurisdiction to restrain any violation of section 19, or to restrain any person from distributing in commerce a product which does not comply with a consumer product safety rule, or both. Such actions may be brought by the Commission (with the concurrence of the Attorney General) or by the Attorney General in any United States district court for a district wherein any act, omission, or transaction constituting the violation occurred. . . ."

15 U.S.C. 2071(a).

²⁴⁴ The agreement is discussed in *Hearings on H.R. 5361 and H.R. 6107 Before the Subcomm. on Consumer Protection and Finance of the Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., Serial No. 94-30, at 160-61 (1975)* (testimony of Joe Sims, Special Assistant to the Assistant Attorney General for Antitrust). The Commission claimed to interpret this agreement so as to allow it to file criminal cases and at one point expressed its intention to file a criminal prosecution. See *id.* at 161; letter from Chairman Richard O. Simpson to Thomas E. Kauper, Assistant Attorney General for Antitrust, dated December 10, 1974, at 3.

²⁴⁵ Doubt is cast on an interpretation which would include criminal litigation by the provision's reference to the bringing of actions "in the name of the Commission," since criminal actions are normally brought in the name of the United States. This ambiguity was sufficient to convince the Justice Department that "Congress did not, and indeed could not have intended to, breach an unbroken precedent in this area in the ambiguous compromise language of the Consumer Product Safety Act." *Hearings on H.R. 5361 and H.R. 6107 Before the Subcomm. on Consumer Protection and Finance of the Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., Serial No. 94-30, at 161 (1975)*.

²⁴⁶ See, e.g., 118 Cong. Rec. 21881 (exchange between Senators Cotton and Guernsey), 21885 (exchange between Senators Cotton and Magnuson), 21887 (remarks of Senator Cotton), 21888 (remarks of Senator Allott), 21889 (remarks of Senator Cotton) (1972).

the Congress examined the Commission's relationship with the Department of Justice and the effect of the Justice Department on the Commission's enforcement policy. Ultimately, Congress determined to remove most of the Justice Department's control of the Commission's civil litigation, in effect codifying the agreement between the Commission and the Justice Department, but to leave the Department's control of criminal matters unchanged. Section 27(b)(7) of the CPSA now gives the Commission power to

(A) initiate, prosecute, defend, or appeal (other than to the Supreme Court of the United States), through its own legal representative and in the name of the Commission, any civil action if the Commission makes a written request to the Attorney General for representation in such civil action and the Attorney General does not within the 45-day period beginning on the date such request was made notify the Commission in writing that the Attorney General will represent the Commission in such civil action, and

(B) initiate, prosecute, or appeal, through its own legal representative, with the concurrence of the Attorney General, or through the Attorney General, any criminal action. . . .²⁴⁷

The Department of Justice may not now prevent the Commission from pursuing a judicial remedy in any civil proceeding. Although the Commission is required first to offer the Department an opportunity to conduct the litigation, however, the Commission still may control substantive litigation strategy.

As with virtually all other agencies, the Department still exercises total control in criminal matters. Although the statute contains the unusual provision authorizing the Commission to conduct criminal litigation when the Attorney General concurs, the Justice Department's long history of jealously guarding its power to control litigation, particularly criminal litigation, makes it highly unlikely the Commission will ever obtain such a concurrence.

2. *The relationship between the Commission and the Department of Justice.*—From the Commission's standpoint, the relationship between it and the Department of Justice has been highly unsatisfactory. In a detailed answer to question 93 of the Subcommittee's questionnaire of June 1975, the Commission explained why.²⁴⁸ For example, the Commission noted:

The nature of the present system whereby Department of Justice personnel represent the Commission in court does indeed cause problems for the agency. While personnel in local U.S. Attorney's offices are generally efficient, the expertise of the Commission is not always adequately reflected, particularly in oral arguments and during the conduct of a trial.²⁴⁹

The Commission asserted that Department attorneys are never as familiar with the laws administered by the Commission as are Commission attorneys and that the Department's representation of the Commission therefore suffers:

Commission attorneys are immersed daily in the laws subject to the Commission's jurisdiction. Such laws are oftentimes relatively foreign or unknown to most Assistant U.S. Attorneys. Since Commission attorneys must largely educate Department attorneys for any given case, the Commission believes needless duplication of effort would be avoided and the quality of its representation before

²⁴⁷ Pub. L. No. 94-284, Section 11(c) (Consumer Product Safety Commission Improvement Act of 1976).

²⁴⁸ The question and the Commission's answer are reprinted in *Hearings* at 248-52.

²⁴⁹ *Id.* at 251.

the courts significantly improved if attorneys employed by the Commission were allowed to represent it in all cases.²⁵⁰

In addition, the Commission stated that the Department, through its power to make the final decision on all matters of litigation strategy, has actually insinuated itself into Commission policymaking:

[I]f the Department does not support the Commission's policy, then the Department of Justice can make the final decision as to what positions will ultimately be filed with the court in a given case.²⁵¹

The Commission then goes on to say:

Department attorneys may not view themselves as advocates to espouse the Commission's policy position but might view themselves as independent determiners of what the agency's position in court should be.²⁵²

Recent experience has shown that the Commission's allegations are not without basis. In a recent opinion a Federal District Judge made a preliminary determination of doubtful validity that the Commission did not have jurisdiction over aluminum wiring.²⁵³

The brief filed on the Commission's behalf by the Justice Department did not respond to a number of the plaintiff's arguments as to why the Commission had no jurisdiction, even though the draft brief which the Commission had submitted to the Justice Department did contain responses to most of those arguments. The court's jurisdictional finding rested heavily on these unresponded to arguments.²⁵⁴ The judge noted that his conclusion was based upon the statutory language and "the legislative history to which I have thus far been referred."²⁵⁵

The Justice Department has defended its own performance and leveled sharp criticism at the Commission. Quite as the Commission directed its bitterest criticisms toward the Department's refusal to file the Commission's criminal referrals, so the Department has aimed its criticism at the Commission's performance in the criminal area. Although the Commission and the Food and Drug Administration have similar mandates and administer similar statutes, the Department points out that a far greater percentage of FDA's criminal referrals are prosecuted. This is due, says the Department, not to a lack of commitment to the Commission's purposes but to the inappropriateness of the cases recommended for criminal prosecution:

[O]ur failure to approach [the percentage of FDA criminal referrals prosecuted] with respect to the Commission reflects no indifference to consumer health and safety. Rather, it reflects a disparity in the kind and quality of cases recommended by the agencies.²⁵⁶

The Department's most frequently cited reason for declining prosecution is delay between the time the offense was committed and the time the Commission referred the case to the Department.²⁵⁷ The Department is also frequently critical of the Commission's sensitivity to

²⁵⁰ *Id.* at 252.

²⁵¹ *Id.* at 250.

²⁵² *Id.* at 251.

²⁵³ *Kaiser Aluminum and Chemical Corp. v. CPSC*, Civil Action No. 76-44 (D. Del., May 27, 1976).

²⁵⁴ *Slip Op.* at 27-33.

²⁵⁵ *Id.* at 33.

²⁵⁶ *Hearings on H.R. 5361 and H.R. 6107 Before the Subcomm. on Consumer Protection and Finance of the Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess., Serial No. 94-39, at 161 (1975) (testimony of Joe Sims, Special Assistant to the Assistant Attorney General for Antitrust).

²⁵⁷ *Id.* at 161-62.

the jury appeal of criminal cases; it has often characterized alleged violations recommended by the Commission for criminal prosecution as "*de minimis*" and claims for itself "a higher degree of sensitivity to factual analysis..."²⁵⁸

3. Analysis. (a) Relevant policy considerations.—Reasons of policy often are cited at some length to support centralizing control of litigation in the Department of Justice. The Department itself has provided a good summary in a memorandum which was inserted into the record of the Senate debate on the original Consumer Product Safety Act:

First, unified control of all litigation would insure that the United States speaks with one voice in the courtroom. Effective enforcement policy requires that significant differences on important legal issues be resolved prior to the courtroom stage so that inconsistent or contradictory positions do not arise to confuse the public and hamper enforcement efforts. Second, centralized decision making permits greater objectivity and selectivity in the filing and handling of cases, as well as the more effective use of test cases as devices to clarify or modify existing law. Finally, unified control of litigation stimulates greater rapport with Federal judges, many of whom have openly and candidly expressed their desire to have government cases presented by Department of Justice attorneys. A former Attorney General has provided an excellent summary of the case for unified control of all litigation involving the Government of the United States:

"Many considerations require this result. Uniformity of interpretation of the laws, the necessity of centralized responsibility for the contracts of the executive with the judicial department, and economy, among others, have forced an organized administration of federal justice. Moreover, attorneys of the Department of Justice, because of their very detachment from the business of administration, are equipped to interpret the laws and gauge the temper of the courts. There are also many objections often made to a system whereby an administrative agency with the aid of its own attorneys first acts in a semijudicial capacity in deciding the scope of its authority and then becomes a litigant in the courts to maintain the validity of its own proceedings.

"A greater variety of experience, increased resources, more numerous assistants, and the nation-wide network of district attorneys, marshals, and special agents versed in the local practice before the courts and local conditions have been made available to all government agencies through the Department of Justice.

"These, plus a tradition dating from the foundation of the government itself, could not be duplicated by single departments or agencies of the government. Without them, no large program of law enforcement could succeed. Cummings and McFarland, *Federal Justice* 490-91 (1937)."²⁵⁹

A comparable body of opinion and argument favors a policy of dispersing responsibility for litigation to specialized agencies. Foremost among the arguments is that dispersion will strengthen an agency's independence.²⁶⁰ As it is virtually impossible to separate policy decisions from decisions affecting litigation strategy, agencies represented by the Department of Justice often find the Department has a significant effect on policy issues which the Congress directed the agencies to decide by themselves.

In addition, there is frequently substantial duplication of effort: agency attorneys, having done the bulk of the legal spade work, must work over the same ground to educate Justice Department attorneys

²⁵⁸ *Id.* at 161, 163.

²⁵⁹ 118 Cong. Rec. 21884 (1972). For a summary of the Justice Department's views of the policies favoring centralized control of litigation presented during consideration of the amendments to the Consumer Product Safety Act, see *Hearings on H.R. 5361 and H.R. 6107*, *supra* note 256 at 159-61 (1975).

²⁶⁰ *Hearings on H.R. 5361 and H.R. 6107*, *supra* note 256, at 186-87 ("It is inconsistent to charge an independent regulatory agency with enforcement of specific laws and then remove the final decision from the agency as to which cases are tried and upon what grounds to base the case strategy"), 234 (1975) (remarks of Chairman Simpson).

on the law, facts, and issues.²⁶¹ Finally, as the Department must set priorities for the litigation for which it is responsible, the Department in effect substitutes its priorities for those which Congress intended the agencies should establish.

Even assuming the Justice Department's policy was in all cases acceptable to the agency, there can be no assurance that the Department's policy will be uniform: policy and priorities are set independently by each U.S. Attorney.²⁶²

The recently issued House Report on the Clean Air Act Amendments of 1976²⁶³ contained a detailed explanation of that bill's grant of litigation authority to the Administrator of the Environmental Protection Agency. Although the policy considerations set out there refer only to specific issues in the administration of the Clean Air Act, they are generally applicable to virtually all regulatory agencies. The committee noted the following considerations which favor dispersion of control of litigation:

The issues which the Administrator is required to litigate are often complex, highly technical issues which require special expertise and backgrounds. . . . The Administrator's attorneys have this special background; in general, Justice Department attorneys do not.

In some instances, the Justice Department has failed to consult the Agency adequately, with resulting harm to proper judicial administration and effective representation.

In some cases, the proper administration of the Clean Air Act has been adversely affected by Justice Department representation.

In some instances, the Justice Department finds itself in a conflict of interest when it tries to represent both the Administrator and other Federal agencies at various times.

Present practice results in wasteful time-consuming, and expensive double staffing which can and should be eliminated.²⁶⁴

(b) *Analysis of Justice Department and CPSC criticisms.*—There can be no doubt that some of the Commission's criticism of the Department of Justice is justified. Fewer than one third of the Commission's criminal referrals have been prosecuted.²⁶⁵ Unquestionably there is duplication of effort when Commission attorneys prepare a case twice, once for the agency and again for the Justice Department attorneys. Justice Department control of litigation does affect the Commission's enforcement posture.

On the other hand, it cannot be denied that the Commission must hold itself partly responsible for the small percentage of criminal referrals which are accepted for prosecution. The Justice Department's most frequent criticism—that the Commission has delayed too long between the commission of the alleged offense and the referral of the case—is indeed valid. In fact, Commissioner Franklin has been

²⁶¹ See Commission's response to question 94 of Subcommittee questionnaire, reprinted in *Hearings* at 253-57.

²⁶² "We do not deal with the Attorney General. We deal with several U.S. attorneys and within those U.S. attorneys' offices, several assistant U.S. attorneys. They have a large caseload and many different things to worry about and cannot afford to speak with one voice. Each attorney has his own idea of priorities and his own strength limitations." *Hearings on H.R. 5361 and H.R. 6107, supra* note 256, at 197 (1975) (testimony of CPSC General Counsel Michael Brown).

²⁶³ H. Rep. No. 1175, 94th Cong., 2d Sess. 272-77 (1976).

²⁶⁴ *Id.* at 273-74.

²⁶⁵ *Hearings* at 67 (table showing Commission referrals and Justice Department action during the first two and one-half years of the Commission's life).

sharply critical of the Commission's performance in this regard. Concurring in a recent decision on a criminal referral, she stated:

I am concerned by the extensive, unexplained, and apparently unnecessary delays in preparing this case for presentation to the Commissioners. Such delays make a clear-cut criminal violation less attractive for the United States Attorney to prosecute, thereby undercutting the Commission's efforts to enforce the laws entrusted to it. . . .

Such extensive, unexplained and unnecessary delay by this agency in developing and forwarding its cases has frequently been a decisive factor for a United States Attorney in declining to prosecute CPSC cases. In declining a 1974 CPSC request to prosecute, a United States Attorney stated:

There is no satisfactory explanation for a delay of an entire year between the alleged offense, where timely prosecution might be a deterrent, and the arrival of the prosecution request." In a subsequent case, the same United States Attorney declined prosecution on the ground that the acts complained of occurred quite a while ago, that is, there has been a delay since the events complained of . . . In light of this, we do not feel that prosecution is warranted or would be in the best interests of the government." More recently, another United States Attorney wrote, in declining to prosecute a 1975 CPSC case: "We have found, in our experience, that stale cases do not receive the type of consideration and penalty from the court that we would appreciate.

This case is not an isolated instance of internal delay on enforcement matters—not even among those cases developed under the 1975 field delegation program. The time span between the identification and confirmation of violations and the appropriate regulatory action must be shortened.²⁶⁵

Chairman Simpson also conceded at the hearing that the time between identification of alleged violations and referral to the Justice Department often had been too long.²⁶⁷ Consequently, the Commission has taken steps to speed the processing of criminal cases. By delegating this responsibility to the field, the Commission estimates it has reduced the time for case preparation from one year to from 3 to 6 months.²⁶⁸

The Commission nevertheless tends to minimize the significance of delay as a factor in the Justice Department's decision-making. It blames the low rate of acceptance of criminal referrals on a difference between the Commission and the Department in assessing the significance of the violations:

I don't think the time has been unusual in the cases that we have sent over. I think the principal argument is that we submit what might be considered de minimus cases, small cases. To us, although a case is small, it represents collectively a large case.²⁶⁹

Subsequently, in responding to the questions which the Subcommittee submitted to it after the hearing, the Commission defended its record on the delay charge vigorously at the same time it established a speedier schedule.

Revised procedures have been implemented during the past year to expedite the case review process. Thus, while a case moved along more slowly in the initial months of Commission operation, the Bureau of Compliance now has as its goal

²⁶⁵ Concurring opinion of Commissioner Franklin in BCMI No. 1862 (January 27, 1976), reprinted in *Hearings* at 331; See *id.* at 47 (testimony of Commissioner Franklin).

²⁶⁷ *Id.* at 68.

²⁶⁸ *Hearings* at 17-18, 29, 68 (testimony of Chairman Simpson).

²⁶⁹ *Hearings* at 68 (testimony of Chairman Simpson); See *Hearings on S. 644 and S. 1000 Before the Subcom. for Consumers of the Senate Comm. on Commerce, 94th Cong., 1st Sess., Serial No. 94-12, at 281-82 (1975).*

the processing of all cases within the Bureau within 1 to 3 months, depending on the complexity of the case.

The Commission believes that its time record for forwarding cases compares favorably with other federal agencies, particularly new agencies in their initial periods of operation.⁷⁷⁰

4. *Conclusions and recommendations.* (a) *Administrative.*—The Commission's newly established goal of processing criminal cases within 1 to 3 months is realistic and must be achieved. Before the Commission can expect a more responsive attitude from the Justice Department, it must improve its own performance.

The Commission should show more sensitivity to the factual nature of the cases it chooses for criminal referral. While it is no doubt true that the Justice Department has on occasion improperly discounted the seriousness of alleged violations referred to it by the Commission, the Commission itself has not been wholly without fault. In selection of criminal cases the attorney should consider realistically how juries may respond to the extent or nature of a violation.

(b) *Legislative.*—The Commission's civil litigation authority, even as expanded by the Consumer Product Safety Commission Improvements Act of 1976, is still inadequate. The Commission should be granted exclusive authority in all civil litigation matters.

Under the present authority, because the Justice Department has a right of first refusal on much of the Commission's civil litigation, the Department may, by taking all or most of the Commission's cases, still dictate the tempo of the litigation, select the issues to be emphasized, and generally insinuate itself into Commission policymaking. Because the Attorney General can intervene in any case involving principles of law broadly applicable to a number of Federal agencies, there will be no danger that granting the Commission exclusive control would result in the establishment of harmful precedents. The Commission should still be able to request the assistance of the Attorney General whenever it considers that course appropriate.

Criminal litigation calls for a different policy. Because of the sharp impact of criminal prosecution on protected constitutional interests, the Department of Justice should retain its historically exclusive control. If the Commission achieves the administrative improvements recommended above, it should be substantially successful in gaining Justice Department approval of its criminal referrals.

Because the Justice Department would have complete control of litigation strategy in criminal proceedings, it is conceivable that the Department could continue to affect Commission policymaking through this avenue. Presumably, however, the Commission would rarely refer criminal violations as test cases or cases of first impression but would use its own litigation authority instead to seek to develop in a civil proceeding a rule of law consistent with its own policies.

B. THE SETTING OF PRIORITIES

Like all other Federal regulatory agencies, the Consumer Product Safety Commission has been directed to deal with a problem of dimensions which are vast in comparison with the resources that have been provided. It therefore must choose from among an extremely large

⁷⁷⁰ Hearings at 164.

number of potential subjects for regulatory action those few which will enable it to make the most of its resources. It must, in short, set priorities.

Priority setting demands a number of judgments. In allocating resources among various ways of dealing with product hazards, the Commission must decide: How much should be spent on prospective regulation? on retrospective regulation? on public education? In addition, the Commission must determine which of thousands of consumer product hazards must be dealt with promptly and which may be deferred. The need to set priorities in both areas was recognized by the National Commission on Product Safety. Section 6 of the legislation it proposed provided in pertinent part:

The Commission shall annually evaluate information obtained by it for the purpose of establishing an order of priorities for its informational, educational, and regulatory activities. After such evaluation the Commission shall publish in the *Federal Register* a list of the categories of consumer products which it believes warrant primary attention, with the reasons therefor. The Commission may from time to time add to, delete from, or modify such list of priorities.²⁷²

The Commission has never explicitly listed its priorities.

1. *Early efforts.*—Soon after its inception, the Commission issued a Statement of Policy. That Statement contained a brief policy on priorities:

The Commission will deal first with those products which pose the greatest risk of injury to the public. The Commission will set (and will periodically reevaluate) its priorities, taking into consideration the number of injuries associated with a particular product, the severity of those injuries, the consumer's likelihood of exposure to that product, and any other factors which the Commission considers important.²⁷³

In March 1974, the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce held hearings when both Commission personnel and private parties appeared as witnesses. Ms. Judy Jackson of the Consumer Federation of America called upon the Subcommittee to question the CPSC as to "what it sees as its priorities for at least the next year, and beyond, if possible."²⁷⁴

Commission Chairman Simpson did not address this point, although he did discuss the Commission's efforts in developing priorities. During CPSC's first 6 weeks he reported that the Commission had begun "to set in motion the orderly development of its operational procedures starting with a means for setting priorities and the establishment of communications with affected public agencies and private groups."²⁷⁵

Facing a universe of perhaps 10,000 products, the Commission was not able to ascertain which were the most appropriate subjects of regulatory action:

It is not difficult to recognize a product which is obviously dangerous or extremely hazardous. It is extremely difficult to determine, from a field of over

²⁷² The NCPS proposed act is set out in National Commission on Product Safety, *Final Report to the President and Congress* (1970). Although this section was not included in the Consumer Product Safety Act, the responsibility to set priorities is implicit in Congress' delegation of broad, discretionary regulatory authority.

²⁷³ The Statement of Policy is reprinted in *Hearings on Consumer Product Safety Commission Oversight Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce*, 93d Cong., 2d Sess., Serial No. 93-83, at 95 (1974).

²⁷⁴ *Id.* at 48.

²⁷⁵ *Id.* at 88.

10,000 consumer products, which present the greatest risks, which are amendable to safety standards, and which are relatively less hazardous. Further, it is difficult to determine which are desirable consumer products requiring additional education and information activity to guide consumers to utilize them properly and safely.²⁷⁶

The prerequisite for making any determinations of relative severity of product hazards was reliable data:

A major need was . . . the development of reliable data on product-related injuries, in order to appropriately deploy resources and provide a reliable universe from which to select those products or classes of products which warrant further study and possible action by the Commission. . .

Ideally, the Commission recognizes it should have the following information to assist in the setting of its priorities: frequency of injuries; severity of injuries; product exposure; medical costs of recuperation; cost of lost man-hours of work and recreation; cost of trauma; additional cost of a product or alternatives due to meeting a safety standard or regulation; and probability of whether a standard will successfully eliminate a hazard.²⁷⁷

Chairman Simpson then described the Commission's work in developing data on product safety. The major part of the Commission's information gathering is the National Electronic Injury Surveillance System (NEISS). To fill gaps left by NEISS, which draws solely upon hospital emergency room data, the Commission also obtains information from death certificates and physicians' offices. The Commission stated that these various information systems did not provide all the data it would "ideally" like to have, but provide a reasonably sound foundation for regulatory decisionmaking.²⁷⁸ It had used the data to compile a Consumer Product Hazard Index, but merely as a "guide," not as a priority list.²⁷⁹

One year later, in February 1975, the Commission again appeared before the Congress for oversight hearings, this time before the Subcommittee for Consumers of the Senate Committee on Commerce. The Commission's formally promulgated policy on priorities remained unchanged: it submitted for the record the Statement of Policy it had issued during the first few months of its existence and had submitted to the Subcommittee on Commerce and Finance during the previous year's oversight hearings.²⁸⁰ Although the Chairman reported that the Commissioners had spent "many days in discussing and in drafting precedential policies designed to guide the Commission now, and in the years ahead,"²⁸¹ his discussion of the Commission's work toward the development of priorities was virtually a reiteration of his statement before the House Subcommittee the year before.²⁸² The Consumer Product Hazard Index had not been updated since October 1973.²⁸³

2. *Efforts in 1976.*—By the beginning of 1976, the failure to establish priorities had led to a situation where the Commission was hopelessly swamped in unproductive work. The Commission complained to

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 88-9.

²⁷⁹ *Id.* at 88. The Commission's most recent annual report notes that this Index "identifies injuries associated with products: it does not indicate a definite cause-effect relationship between the product and the injury. Thus, it provides the Commission with one indicator of products needing additional research to establish cause and effect relationships from which priorities for Commission actions can be programmed." Consumer Product Safety Commission, *Annual Report 13* (1975).

²⁸⁰ *Hearings on S. 644 and S. 1000 Before the Subcommittee for Consumers of the Senate Committee on Commerce, 94th Cong., 1st Sess., Serial No. 94-12, at 204-05 (1975).*

²⁸¹ *Id.* at 197.

²⁸² *Id.* at 196-97.

²⁸³ *Id.* at 197.

Congress that it was constantly forced to react to outside events and thus was not able to plan:

We have found ourselves continuously in a reactive stance. Last year we estimated 75 percent or more of our activities were reactive as opposed to planned.²⁸⁴

The only standard which had been promulgated under the authority of the Consumer Product Safety Act dealt with swimming pool slides,²⁸⁵ hardly the most hazardous consumer product. Even the Commission Chairman conceded that development of this standard was "the least productive agency proceeding."²⁸⁶

In the Commission's view, the unhappy situation in which it found itself was not the result of its failure to set priorities but rather insufficient funding and a defective statute:

The Consumer Product Safety Commission has never, in my opinion, had the advantage of an adequate base budget. It has never received funding from the Congress which would permit it to address on its own initiative those candidates for regulation which score high on our priority list. We have found ourselves continuously in a reactive stance, with priorities imposed by the language of the legislation and the implementation of the requirements of the statute. That is, the provisions of Section 10 with its mandatory forcing actions and time frames; the followup provisions of Section 7; the need to respond to Section 15 reportings and the inability to take our own cases into court in order to leverage our enforcement capabilities.²⁸⁷

Subsequently, Commissioner Pittle prepared a draft Commission policy on priorities and circulated it to the other Commissioners.²⁸⁸ The draft policy would have directed the Commission staff to prepare and submit for Commission approval priorities for Commission action in the duties of regulatory development, evaluation of petitions, and information and education. Although the staff was to provide a "brief explanation of the criteria used" in setting the priorities, Commissioner Pittle's draft gave no indication of what these criteria should be.

Chairman Simpson was sharply critical of Commissioner Pittle's proposal, both for its failure to articulate criteria and for what he perceived to be its encroachment on his prerogatives as Chairman. The proposal, he argued,

is not a policy at all, but rather a specific approval procedure. . . . As such, the procedure proposed by Commissioner Pittle lacks the basic characteristics of general policy in that it provides no substantive criteria by which the worklist should be ordered.²⁸⁹

Moreover, because the proposal covered procedural rather than substantive matters, according to Simpson, it improperly invaded the statutory responsibilities of the Chairman:

Commissioner Pittle's document correctly identifies Section 4(f)(2) CPSA as the Commissioner's [sic] authority to establish general policy. The items proposed, however, being procedural or administrative in nature have fallen into conflict with Section 4(f)(1) that designates the administrative function of the Commission as the responsibility of the Chairman.²⁹⁰

²⁸⁴ *Hearings* at 15.

²⁸⁵ 41 Fed. Reg. 2742 (1976).

²⁸⁶ *Hearings* at 7, 25.

²⁸⁷ *Hearings* at 28 (testimony of Chairman Simpson).

²⁸⁸ Memorandum from Commissioner Pittle to the Commission, dated March 22, 1976.

²⁸⁹ Memorandum from Chairman Simpson to the Commission, dated March 31, 1976.

²⁹⁰ *Id.*

The Chairman then indicated his belief in the need for a Commission policy on priorities, particularly with respect to petitions:

The Commission could profitably turn its attention toward the development of a written general policy on priorities instead of continuing to focus on procedures which look much like "managing by committee." . . . At this point, the most critical operational requirement for general policy lies in the area of petitions and is not addressed in the proposal.²⁹¹

On April 7, 1976, Commissioner Pittle circulated another draft, this one containing criteria to be applied in setting priorities. Although he subsequently circulated two more drafts, on April 14 and May 26, the Commission did not act on this matter during Chairman Simpson's tenure, which ended late in May.

Finally, on July 1, 1976, under its new Chairman S. John Byington, the Commission adopted a policy on priorities.²⁹² The policy properly provides that priorities will be established by a majority vote of the Commission.²⁹³ The Commission's annual operating plan will be voted on by the Commission and is to be "as specific as possible with regard to products, groups of products, or generic hazards to be addressed."²⁹⁴ The policy lists the following criteria which are to be used in determining priorities:

- (1) Frequency and severity of injuries;
- (2) Causality of injuries;
- (3) Chronic illness and future injuries;
- (4) Cost and benefit of CPSC action;
- (5) Unforeseen nature of the risk;
- (6) Vulnerability of the population at risk;
- (7) Probability of exposure to hazard; and
- (8) Additional criteria that may warrant CPSC attention.²⁹⁵

3. *Analysis of the Commission's efforts to set priorities.*—Although the Commission's failure to set priorities in its early months may have been justified, that natal period now is past. In the words of the new Chairman:

[T]he "Age of Infancy" at CPSC is over! No longer can we claim infancy as a regulatory agency as an excuse against legitimate criticism. Three years is long enough to "get your act together". . .²⁹⁶

The Commission's claim that the setting of priorities requires sufficient data on product associated injuries is equally weak. Regulatory policymaking can never await the assembly of complete and perfect data. In a world of uncertainty, the data the Commission has amassed can serve as a reasonable foundation for priorities. The Commission has the best data available anywhere on product associated injuries. As Chairman Simpson testified:

I think the injury data that we have is probably superior to most of those in the regulated industries, and I think they are using our data. It is very much of a plus.²⁹⁷

Although the Commission appears no longer to rely on these excuses, the new reasons put forth for its failure to set priorities are no less

²⁹¹ *Id.*

²⁹² 41 Fed. Reg. 27960 (1976).

²⁹³ 16 C.F.R. 1009.8(b). 41 Fed. Reg. 27960 (1976).

²⁹⁴ 16 C.F.R. 1009.8(b)(2). 41 Fed. Reg. 27960 (1976).

²⁹⁵ 16 C.F.R. 1009.8(c). 41 Fed. Reg. 27960-61 (1976).

²⁹⁶ Speech of Chairman Byington before the Weights and Measures Conference of the National Bureau of Standards, July 14, 1976.

²⁹⁷ *Hearings* at 78.

feeble. Former Chairman Simpson's claim that citizen petitions under section 10 of the CPSA²⁹⁸ irreparably impair the Commission's ability to set priorities will not withstand careful analysis. As previously noted,²⁹⁹ there are few section 10 petitions.³⁰⁰ The notion that the Commission's own priorities cannot be factored into the consideration of such petitions is simply erroneous.³⁰¹

The Commission's recently adopted policy on priorities appears to be a step in the right direction. Although there is yet no list which ranks products or product categories in order of priority, this new policy requires the Commission to include in its annual operating plan such a priority ranking which is "as specific as possible . . ." ³⁰² The Subcommittee believes a specific ranking of this nature is necessary to the effective functioning of the Commission. With this premise in mind, we intend to scrutinize the coming annual operating plan carefully.

V. Conclusions and Recommendations

Based on its review of the Consumer Product Safety Commission, the Subcommittee makes the following recommendations, all of which can be acted upon without additional legislation:

(1) The Commission must develop a better capability to plan and to set priorities. The recent policy on priorities, which will soon produce a priority list of specific products, is a step in the right direction.

(2) The Commission should use its authority to promulgate mandatory product standards to the maximum extent possible. Voluntary standards, initiated by industry and standards organizations, may be appropriate to address hazards or products which the Commission, because of limited resources, is unable to address with mandatory standards. Whenever the Commission relies on voluntary standards, it must ensure, at a minimum, that the final standard reflects effective consumer participation.

(3) The Commission should increase its efforts to implement the manufacturer notification requirement of section 15(b). It should develop a means for determining, even if only approximately, the degree of compliance with this requirement. In addition, it should bring enforcement proceedings against persons who fail to comply with the requirement to demonstrate the Commission's commitment to full and vigorous enforcement of the statute.

²⁹⁸ 15 U.S.C. 2059.

²⁹⁹ See note 204 *supra*, and accompanying text.

³⁰⁰ Hearings at 92, 169-73.

³⁰¹ Although Chairman Simpson had apparently convinced the Chairman of the Senate Appropriations Subcommittee at the hearings of the correctness of his interpretation of section 10 15 USC 2059 the report subsequently issued by the Senate Committee on Appropriations was sharply critical of that interpretation:

"The Committee takes strong exception to this stand by the Commission. The Committee believes that there is sufficient room for interpretation of "unreasonable risk of injury" under section 3 of the Act, to allow the agency to decide if a particular product presents an unreasonable risk of injury by, among other factors considering (1) how many other products with comparatively higher frequency and severity of injury rates need to be regulated first and (2) the resources available to the Commission for issuing standards and bans. . . .

"Therefore, the Committee believes that the Commission does, in fact have the authority and the responsibility to consider both the relative frequency and severity of injury and the resource constraints of the agency when considering the potential hazards of products, that are brought before the Commission for review. The Committee looks for significant progress in this area in fiscal year 1977."

S. Rep. No. 974 94th Cong., 2d Sess., 29 (1976).

³⁰² 16 C.F.R. 1009.8(b)(2), 41 Fed. Reg. 27960 (1976).

(4) The Commission's various imminent hazard authorities, though not to be used lightly, should be used with greater frequency than they have been to date. To facilitate this, the Commission should consider promulgating rules or guidelines which, while not impairing the flexibility necessary to the use of these powers, would be useful in identifying appropriate target products.

(5) The Commission's information and education activities must be made more effective. The Commission should develop new ways of effectively communicating information about product hazards and safe product use to consumers. In addition, it should give consideration to instituting a program to evaluate the safety of specific products, on a brand-by-brand basis, and publish its conclusions. The Consumer Product Safety Act empowers the Commission to establish such a program.

(6) While the Commission's openness policy is generally a model for Federal agencies to emulate, in a few instances it has produced unreasonable results, particularly the release of internal legal strategy memoranda. The release of such memoranda impairs the effectiveness of the Commission and, by chilling the candor of the staff, could deprive the Commission of the advice necessary for sound decision-making. These memoranda should not, therefore, be disclosed.

(7) The Commission should continue strictly to adhere to the requirement of Section 27(k) of the Act that it communicate all budgetary and legislative recommendations directly to the Congress. Any interference by the Office of Management and Budget violates Section 27(k) and is unlawful.

(8) The Commission should develop a program to monitor compliance with the prohibition of Section 4(g)(2) of the Act on the employment of former high level Commission employees by regulated manufacturers. The Subcommittee believes that such a program can be implemented quickly and easily, at little cost to the Commission.

(9) The Commission should undertake a comprehensive review of the role of its advisory committees. If it believes such committees can make a significant contribution to Commission policymaking, it must improve the quality of the membership of these committees, provide them with better staffing, and increase the frequency of their meetings. If the Commission believes that its advisory committees should not or cannot play a meaningful role in Commission decisionmaking, it should report that conclusion, with explanation, to the Congress.

(10) The Commission should make available substantially greater funding to consumer groups involved in the standards development process. This funding should be sufficient to ensure vigorous and effective participation of consumers, both as offerors and as members of standards development committees.

(11) The Commission should conduct a detailed and comprehensive review of the workings of the "offeror" process to date. It is critical that the experience of the agency using this process be carefully studied so that deficiencies can be detected or the process amended.

(12) The Commission should commence a rulemaking proceeding to develop standards for the funding of consumer participants in agency proceedings. The Commission has already expressed its agree-

ment with the Subcommittee and the Comptroller General that it has authority to provide such funding. It should therefore develop appropriate guidelines for the disbursement of such funds and include in its future budget submissions a request for funding to underwrite such a program.

(13) The Commission should develop a capability to manage consumer petitions more efficiently. While it must not vitiate the statutory right of citizens to petition the Commission, it should deny those petitions which rank low in its order of priorities. There can be no doubt that it has authority to deny such petitions. In addition, the Commission must respond to citizen petitions in a timely manner. Petitions under the Consumer Product Safety Act must be responded to within the statutory time limit of 120 days, and petitions under the transferred acts should be acted upon within a similar period of time.

(14) The Commission should vigorously utilize the full panoply of its information-gathering powers, at the same time taking care that data sought are truly necessary for its regulatory and information activities and their collection does not unnecessarily burden business.

(15) The Commission should rely whenever possible on notice and comment rulemaking, particularly the expeditious procedures of the Child Protection and Toy Safety Act. The Subcommittee considers that the absence of such expeditious procedures, as for example in the Federal Hazardous Substance Act, is a sufficient basis for the public interest finding required by Section 30(d) of the Act, as amended.

(16) The Commission should promulgate "summary judgment" rules to provide it with a basis for denying an extended, trial-type hearing where there are no disputed issues of material facts. Any need for affected parties to present legal arguments should, in such cases, be accommodated by allowing written submissions. The Commission has inherent authority to promulgate such procedural and interpretative rules. Such rules are appropriate whenever a statute requires that there be an "opportunity" for a hearing.

(17) The Commission should promulgate rules setting forth the types of agency action which necessitate the preparation of an environmental assessment and providing guidance to the Commission staff for the implementation of the National Environmental Policy Act.

FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 7

FEDERAL COMMUNICATIONS COMMISSION

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CHAPTER 7

FEDERAL COMMUNICATIONS COMMISSION

I. Summary

Until recently, the Federal Communications Commission (FCC) has displayed a reluctance to frame decisions that run counter to the wishes of firms that dominate the equipment and operation of broadcasting and telecommunications services. The Commission tended to cling loyally to the status quo in a rapidly changing technology. Today the Commission seems to be growing in sensitivity to the public interest with respect to cable television, telephone equipment, and competition although it remains besieged by powerful external pressures. Apart from the complexity, technical diversity, and protean instability of the situations it regulates, the Commission suffers from the fact that the Congress and the public cannot possibly give as much attention as the regulated firms give to its proceedings.

We have examined the work of the Commission in six situations. Its early failures to anticipate future developments or to serve the public interest appear in its allocation of television channels, the process of renewing broadcasting licenses, and its impedence of cable television. Its handling of mobile senders and receivers on land (land mobile) and its regulation of the telephone services demonstrate complex issues that mingle failure with some success.

Although we are concerned that some decisions have reflected narrow political¹ as well as economic interests, we have reason to hope for improvement.

¹ On the eve of a crucial primary election pitting President Ford against challenger Ronald Reagan, a Miami, Florida TV station, WCKT, recorded a 30 minute interview with President Ford which the station broadcast in five 6-minute segments, one each night during the evening news program, concluding on March 5, 1976, some 5 days before the Florida primary election. When Reagan supporters asked for equal time, the FCC ruled that President Ford's interview fell within the "bona fide newscast exemption" because it was broadcast in the context of a news program. The ruling rejected Reagan's claim that the FCC should "examine instead the composition and nature of the interviews themselves in order to determine whether they qualify for exemption on their own merit." If the FCC had looked further, it might have learned, as the subcommittee staff did, that the station's news director had initiated the interview through Republican party officials and representatives of President Ford's campaign committee. The FCC letter opinion stated that it "cannot conclude that WCKT acted unreasonably in determining that the appearances by President Ford in interviews broadcast during evening newscasts are exempt from the equal opportunities provision."

On Sept. 23, 1975, the Commission voted 5 to 2 to exempt "press conferences of the President and all other candidates for any political office broadcast live and in their entirety" from the equal broadcast opportunities section of the Federal Communications Act. The vote, overriding a 1964 Commission decision, gave a decided advantage to the incumbent President.

Television writer Sander Vanocur described the decision:

Gerald Ford has been flying around the country of late, being interviewed by local stations which give him just about any amount of air time he wants. He is no different in this respect from other Presidents who get from local stations and networks just about anything they want when they want it.

But Wiley and four of his fellow commissioners have now given him even more. And he will use it. He would be foolish not to. Only the courts and the Congress can change this enormous grant of political power. But that will take time. And while the issue is being debated in the Congress and litigated in the courts, Mr. Ford will be right up there on our sets whenever he thinks it will suit his purposes, as President or as candidate, as if there is a difference between the two.

The Commission's principal handicaps have been (1) insufficient public representation to offset the assiduous attention paid by commercial interests, (2) failure to anticipate or keep pace with technical and commercial developments in communications, (3) a deficiency of technical expertise for analysis of complex issues resulting in failure to develop facts basic to regulation of the broadcasting and telephone industries, and (4) inertial acceptance of prevailing patterns.

Although the Commission's lack of policy cannot be attributed to the Congress, we believe the Congress should establish closer relations with the Commission for the purpose of clarifying legislative intent and obtaining funds sufficient to serve the purpose of the law. Basically, it is the Commission itself which must determine how to offset narrow interests with fair representation of public interests.

One of our major recommendations concerns the qualifications of the Commissioners, those chosen to lead this important agency. The regulated industries closely monitor the process of selecting, nominating, and approving appointments to the Commission. They may seek to block the appointment of a Commissioner who might be unsympathetic, as is their right. Those eventually appointed to the Commission, whatever their views, find themselves courted by the regulated industries. Too many who serve on the Commission expect that when they leave the agency they will go to work, in one way or another, for the industries they are sworn to regulate. Their legitimate concern for their future tends to make them, consciously or unconsciously, sympathetic to their future employers.²

The Subcommittee's recommendations include the propositions:

1. That the Congress establish a closer relationship with the FCC through vigorous oversight, through professional staff exchanges, and through research that will inform its Members of developments in communications.

2. That the Congress give serious consideration to legislation such as the FCC Reorganization and Reform Act, which reduces the number of Commissioners, and adds professional staff. It also provides that legislative and budget recommendations by the FCC be submitted directly to the Congress.

3. That the FCC acquire staff with expertise in telecommunications technology, business, economics, and the behavioral sciences, in order to do needed independent research and analysis, both long and short-term, in the important fields of broadcasting, cable, common carrier (both domestic and international), and spectrum management. While the Commission has an ample and reasonably competent legal staff, it is still under-represented in technology, trade practice, marketing and economics. Since much communications policymaking possesses interdisciplinary characteristics, professionals trained in pertinent disciplines should be engaged to lend their expertise to the Commission's decisions.

² See "Appointments to the Regulatory Agencies: The Federal Communications Commission and the Federal Trade Commission, 1949-1974," printed at the direction of the Committee on Commerce of the Senate, April 1976, U.S. Government Printing Office, and Henry Geller, "A Modest Proposal to Reform the Federal Communications Commission," the Rand Paper Series, Santa Monica, California, April 1974. (See chapters 2, 8, 12 of this report.)

II. Mandate

A. INTRODUCTION

The Federal Communications Commission was created in 1934 in part because President Franklin D. Roosevelt believed that governmental authority over certain forms of communication should be consolidated in one Federal agency. Before its creation, the duties of the FCC were divided among the Interstate Commerce Commission (ICC), the Federal Radio Commission (FRC), the Postmaster General, and the President.

Though the Interstate Commerce Commission had jurisdiction over common carriers engaged in communication by wire or wireless since 1910, it never centralized its authority in a single bureau. The Federal Radio Commission had been given authority in 1927 to license radio stations. Certain minor functions had been assigned to the Postmaster General and the President.

In the summer of 1933, at the direction of President Roosevelt, Daniel C. Roper, the Secretary of Commerce, appointed an Interdepartmental Committee on Communications to develop a coherent and unified national communications policy. In January, 1934, the Roper Commission recommended that the new agency be created with authority to regulate communications by wireless.

The Communications Act of 1934, not surprisingly, reflects the previously established approach to communications regulation: Title II of the Act, dealing with common carriers, was, in effect, lifted from the Interstate Commerce Act, and Title III of the Act, dealing with radio, was, with some changes, virtually identical to the 1927 Radio Act.

The primary purpose of the new communications legislation was to consolidate these various jurisdictional functions in one regulatory agency armed with authority to regulate the telephone, telegraph, and broadcasting industries and to propose legislation needed to carry out its mandate.

B. SUMMARY OF THE COMMUNICATIONS ACT OF 1934

The Communications Act of 1934 did not address issues. Rather, the new Commission was given approximately 6 months to develop legislative proposals and present them to the Congress regarding the specification and expansion of its regulatory authority. In particular, Section 215 of the Act directed the Commission to study and report on the following:

(1) Certain transactions of common carriers which could affect the charges made for services rendered to the public. These transactions, including those relating to the furnishing of equipment, supplies, research, services, finance, or credit, whether by a single company or group of companies controlled by the same interests. The Commission was also directed to report on the desirability of requiring competitive bidding in cases where the same company or group of companies were both buyers and sellers.

(2) The methods by which, and the extent to which, telephone companies are furnishing telegraph services and telegraph companies were furnishing telephone services.

(3) The effect of exclusive contracts entered into by common carriers which prevented other competing carriers from locating offices in railroad depots, hotels, and other public places.

Title I of the 1934 Act contains general provisions. Specifically, it is a declaration of the purposes of, and necessity for, the legislation and establishes the Federal Communications Commission. Additionally, it makes the bill applicable to all interstate and foreign communications by wire or radio, except that independent telephone companies engaged in interstate or foreign communications only through physical connections with another nonaffiliated carrier are subjected only to certain sections of the Act designed to insure reasonableness of rates and nondiscrimination in service. Section 3 contains relevant definitions for the most part borrowed from the Interstate Commerce Act, the Radio Act, and various international conventions. Section 4 provides for a Commission composed of 7 members holding 7-year terms. Section 5 authorizes the Commission to create not more than three divisions within its membership which have the authority to hear and determine cases in the same manner as the ICC.

Title II of the Act relates to common carriers and sets forth the duties and obligations of common carriers engaged in communications service and the powers of the Commission. For the most part it follows the provisions of the Interstate Commerce Act applicable to communications or adapts some provisions of that act applicable only to transportation.

Title III consists of a single section which abolishes the Federal Radio Commission, created in 1927, and transfers its functions delineated in the 1927 Act to the Federal Communications Commission.

Title IV contains procedural and administrative provisions substantially the same as those contained in the Interstate Commerce Act.

Title V refers to penal provisions and forfeitures and is adapted from the Interstate Commerce Act, the 1927 Radio Act, and the Elkins Act.

Title VI contains miscellaneous provisions. Specifically, Section 601 transfers to the Commission duties, powers and functions of the ICC and the Postmaster General not repealed by the bill, and Section 602 repeals the provisions of the Interstate Commerce Act insofar as they relate to communications.

C. LEGISLATIVE HISTORY OF THE ACT

The legislative history of the Act shows that its authors had two choices: to write a detailed bill incorporating all existing legislation, or write a short bill simply creating the Commission and delegating to it, by reference, the powers previously vested in the Interstate Commerce Commission, the Federal Radio Commission, the President, and the Postmaster General. Congress chose the latter course.

Under the Interstate Commerce Commission, the regulation of the telephone company had been negligible. All the ICC had done with the telephone industry was to establish a uniform system of accounts and require annual reports of such information. Those drafting the

new communications legislation believed that unless the new Commission had full and complete knowledge of the contractual relations between all parties (the parent, the subsidiary and the affiliated corporations) engaged in the telephone, telegraph, and cable business, government regulation would be ineffective.

In a message to the Congress on February 26, 1934, the President stated that deficiencies in the legislation could be remedied after the new Commission had begun to function. President Roosevelt said that the FCC should have authority "to investigate and study the business of existing companies and make recommendations to the Congress for additional legislation at the next session."

During the years prior to 1934, it was acknowledged that regulation of communications firms had been negligible. The new legislation aimed to create a center of communications expertise capable of performing research and pursuing investigation.³

The mandate given the new commission for the regulation of the various communications services was clear as to the end, but not as clear as to means.

Section 1 of the 1934 Act says:

SEC. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communication Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

In order that the Commission be able "to make available, so far as possible, to all people of the United States a rapid, efficient, nationwide and worldwide wire and communications service", the legislation (Section 303) lists 19 separate powers of the FCC. The one referred to most frequently is that the Commission "study new uses for radio, provide for experimental uses of frequencies and generally encourage the larger and more effective use of radio in the public interest."⁴

III. Implementation of Mandate

The Federal Communications Commission has three principal functions: adjudication, rulemaking, and administration. The granting or repeal of licenses is an administrative act. Policy planning, too, is essentially an administrative function, though it may lead either to rulemaking or adjudication. Traditionally, the formulation of rules had been the duty of the Congress, and the application of those rules to individual parties, the duty of the courts. Legal, technological and economic evaluation has combined these functions in regulatory agencies such as the Federal Communications Commission.

The major improvement of the 1934 Act over previous regulation was in Section 303(g), giving the Commission authority to conduct

³ 47 U.S.C. § 303(g) (1934).

⁴ *Id.*

research and experimentation that would lead to the "larger and more effective use of radio in the public interest." The major weakness of the law was the absence of specific standards to guide the Commission.

This structure is consistent with the history of governmental efforts to respond to the needs of the communications industry. When commercial radio first gained popularity, Federal regulatory efforts were much like those of a lone traffic policeman trying to untangle a mass of stalled vehicles in a rush-hour traffic jam. Though regulatory efforts of the Secretary of Commerce were frustrated by the Courts, broadcasters found little, if any, relief in legislation. The creation of the FCC's predecessor, the Federal Radio Commission, was a Congressional attempt to bring order to a regulatory and auditory cacophony that was growing worse by the week. Initially given a term of 1 year, the Radio Commission's mandate had to be renewed by the Congress annually.

Such a tentative approach did little to rationalize an industry that was growing out of its clothes. In creating the Communications Commission, the Congress linked the new regulatory agency to its antecedents by directing the Commission to regulate the national system of communications "in the public interest, convenience and necessity."

The Commission's problems can be attributed to several factors. Initially, the early, intense work on legislation for regulating communications reworded an established regulatory pattern which was bestowed on the FCC. Current problems are the absence in the Commission's structure of a public counterweight to the industry in the regulatory process; insufficient attention to the qualifications of Commission members; the prominence of advertising on television; the concentration of control and ownership of major communications channels; the infrequency or low quality of prime-time programming for special purposes or audiences; and the technical limitations on the number of channels that may be used for communication.

Some of the examples of the Commission's response to Congressional interest are:

The creation of a Consumer Information and Assistance Office within the Commission.

The creation of a Children's Task Force to research and report on programming and advertising directed toward children.

The building up of the Office of Plans and Policy within the Commission in order to expand and strengthen research and independent analysis.

But there remain notable shortcomings:

Commission meetings have been largely private. Too many allegations persist of private agreements between the Office of the Chairman and the regulated industries. For example, the Commission, after a series of private meetings between the Chairman and broadcast industry representatives, decided to issue a policy statement rather than a rule in the proceeding on children's television which was terminated in October, 1974. This decision has been challenged in a suit brought by Action for Children's Television, a citizens' group based in Boston, on the ground, among others, that the FCC improperly excluded the group from the proceedings.⁵ Similarly, a series of private meetings

⁵ *Action for Children's Television v. FCC*, 74-206 (D.C. Cir. 1974). See, Brief for Petitioners, filed Nov. 14, 1975, n. 25 *et seq.*

held between the Chairman and broadcast industry led the National Association of Broadcasters to adopt the family viewing concept in early 1975. Public interest groups and the program producers complained that they were excluded from the meetings but were affected by their outcome.

IV. Case Studies

A. VHF-UHF TELEVISION ALLOCATION ISSUE

One of the FCC's most visible and important functions is the allocation of broadcast frequencies. Here we examine the FCC's allocation process for television from only one perspective: the use of the VHF and UHF bands.⁶

Since bands are assigned free of charge, the balancing forces of the marketplace do not serve to govern the competition. FCC rules and regulations decide which users will be favored.

Broadcast bands are limited not only by their nature but by wasteful management and allocations practices.⁷ As long as the bands are free, the arguments before the FCC may be expected to follow the traditional "my use is more in the public interest than is your use." Consequently, the Commission has found itself having to decide between two or more competing users, all equally meritorious.

The Commission has done less than its utmost to exploit technological developments that would substantially increase the uses of the spectrum. It has elected to assign for use an increasing number of bands at progressively higher frequencies with the effect of reducing the widths of the bands available to individual broadcasters, thereby increasing the probability of interference. Other options for use of the bands provided by new technology, such as UHF stations, are rejected because the Commission and current holders have been reluctant to disturb established patterns of service. Use of the new technology would broaden competition with all that competition implies: risk of venture capital, obsolescence of past investments, increased incidence of failure, and lower profits for individual commercial broadcasters and networks, but also broader opportunities, wider diversity of programs, and more services with highly specialized purposes.

1. The VHF mistake

The Commission recognized as early as 1945 that it could not obtain an effective nationwide television service using only the 12 available VHF channels:

The Commission is still of the opinion that there is insufficient spectrum space available below 300 megacycles VHF to make possible a truly nationwide competitive system. Such a system, if it is to be developed, must find its lodging higher up in the spectrum UHF where space exists and where color pictures

⁶ Broadcasting is transmitted via the electromagnetic spectrum, a complete range of waves characterized by varying frequencies and lengths. The VHF (very high frequency) band is in the 30 to 300 megacycle range of the spectrum. The UHF (ultra high frequency) range is 300 to 3,000 megacycles. As substantial portions of the spectrum between 216 and 470 megacycles are used by the government, the FCC cannot extend the use of the VHF spectrum for television. The television allocations are: VHF—54 to 216 megacycles; UHF—470 to 800 megacycles.

⁷ See Raymond Wilmette, "Technological Boundaries of Television," Office of Chief Engineer, Federal Communications Commission, Washington, D.C., December, 1975. Available from the Commission.

and superior monochrome pictures can be developed through use of wide channels.⁸

Each television channel requires six megahertz. To avoid interference, each station occupying that channel or an adjacent channel must observe certain basic mileage separations (called co-channel and adjacent channel separations).

Despite this restriction, the FCC, in the period from 1945 to 1948, decided to approve development of television in the only part of the spectrum where receiving equipment had been manufactured: the VHF band. In doing so, the Commission yielded to the views of those who had bought the early TV sets and to the wishes of firms dominant in the broadcasting and manufacturing industry, notably Radio Corporation of America (RCA), which also owns the National Broadcasting Company (NBC) one of the Nation's three TV networks.⁹ Although the Commission predicted that a final ideal band for television was in UHF, it never considered how the transition from a dominant VHF system to UHF would proceed.¹⁰

The FCC not only approved TV broadcasting in the VHF range but compounded that error with others. It allocated seven VHF stations to New York City because the broadcast industry lobbied for the maximum number in this densely populated market, even though this decision was unfair to others in the Northeast and effectively denied any VHF stations to New Jersey. (Originally, Channel 13 was allocated to New Jersey but was moved to New York City for public television.)

In September 1948, the Commission froze all television grants while it considered extensive complaints of interference. At this early stage, it could have moved all television to UHF, because there were then only 37 TV stations serving 15.3 million homes.

The Commission faced a critical decision. It knew that a truly nationwide system would have to use the UHF band, where 70 channels were available. Simply to add UHF channels to established VHF assignment in the same city raised economic doubts: the VHF system was entrenched; the UHF system would have no viewers unless sets were built to receive UHF signals. Could the UHF operator compete successfully with VHF stations? The Commission was urged not to open the markets to both VHF and UHF signals by the American Broadcasting Company (ABC) and DuMont networks. Dumont predicted that the mix would destroy its network. Dumont, for example, asked the Commission to establish regional television stations, rather than local stations. What Dumont wanted was 4 VHF assignments in each of the regions so that it might survive as a VHF network along with ABC, CBS, and NBC.

Parties in the Commission's rulemaking proceeding urged the isolation of VHF and UHF in separate markets, as did some members of Congress.¹¹

The Commission voted to approve both UHF and VHF in the same areas. As a result, most UHF stations are still struggling to overcome

⁸ FCC Final Report, May 25, 1945, FCC Docket No. 6651, pp. 99-100, 1 (Part 3) Pike and Fischer, *Rad. Reg. Par.* 91:67.

⁹ See discussion in Avard Brinton, "The Regulation of Broadcasting by the FCC—A Case in Regulation by Independent Commissions" (Harvard University Press, 1962), pp. 178-331.

¹⁰ See Geller, note 2, *supra*, at 3-12.

¹¹ *Ibid.*

their initial disadvantage. In the 5-year period after the VHF freeze, 78 UHF stations went dark as compared with only 4 VHF failures. As predicted, the DuMont network died in 1955, ABC, the third network to be established, had difficulty in negotiating effective outlets in important markets: it was years before the ABC television network became profitable.¹² As recently as 1967, the American Broadcasting Company claimed that it was necessary to merge with International Telephone and Telegraph (ITT) in order to compete with NBC and the Columbia Broadcasting System (CBS). (The proposed merger between ABC and ITT stipulated that ITT would provide ABC with needed financial assistance.)

As a consequence of this policy, much of the UHF band is idle, despite an absence of satisfactory television service in many communities. In 1976, less than 30 percent of the UHF spectrum is used by broadcasters, but the Commission refuses to approve use of that part of the spectrum for other services.¹³

Dominant VHF stations leave small chance for the commercial success of more than three networks. Whether or not there is an economic base for more than three networks, that decision could have been left to the marketplace rather than ordered technologically by the Commission. If the Commission had chosen to go with UHF, however, the public today would have undoubtedly had more television stations and greater choice, especially in regions of the country where this choice is currently limited. There were, of course, 2 important technical problems relating to UHF—it needs more power than VHF—therefore transmission costs are higher, and it is more susceptible to shadow. The Commission also had to consider the arguments of those who had already invested capital in the VHF system, and chose in favor of short-term expediency rather than the long-term public benefit to be derived from diversity of choice. Although “the VHF Mistake” can be examined today with the gift of hindsight, it is nonetheless correct to state that, by its artificial limits on TV opportunities for entrepreneurs, the Commission has consistently favored entrenched networks and their VHF affiliates. According to Commission data, the average net profit (before taxes) of the VHF network affiliates in the top 100 markets is 30 percent of revenues.¹⁴

2. The VHF drop-in controversy

Two major issues persist regarding the VHF-UHF television bands: the VHF drop-in, and the under-utilization of the UHF band, now in demand by other services and by the government. Currently, nearly every available VHF frequency is assigned and in use, in contrast to the UHF band, which remains 70 percent open. Major changes in the assignment rules for the VHF band would present serious practical problems. For example, bandwidth reductions and greater picture resolution would require changes in television sets and antennas. The one change that is attractive is the insertion of VHF television stations in special locations, the drop-ins, where TV service

¹² See Alan Pearce, “The Economics of the Prime Time Access Rule,” Federal Communications Commission, p. 26 (1973). Available from the Commission.

¹³ See Rand Corporation, “Projecting the Growth of Television Broadcasting: Implications for Spectrum Use,” 1-8, R-1841-FCC, 1976.

¹⁴ Broadcast industry financial data published annually by FCC as News Releases. Available from Office of Public Information, FCC.

is in demand, and where little or no interference would be experienced, by means of limiting the power of drop-in stations and requiring directional antennas. The Office of Telecommunications Policy within the Executive Office of the President completed a study of potential VHF drop-ins for 100 major markets in October, 1973. Because of criticism, principally from broadcast industry, it undertook to verify its original findings with a second study, completed in May, 1974. The 1973 study suggested that 67 VHF drop-ins could be introduced without adverse effects. The 1974 study suggested that 83 VHF drop-ins could be accommodated. In a letter from the Director of OTP to the FCC Chairman, dated May 14, 1975, the Office of Telecommunications Policy urged that the Commission do as the Office of Communications of the United Church of Christ had suggested in March 1974: open the question for public comment and rulemaking. The Commission issued a Notice of Inquiry on April 1, 1975, still pending under Docket No. 20418. Although the issue was scheduled for consideration in July, 1976, FCC postponed consideration until the fall.

Drop-ins promise to increase competition for VHF broadcasting. According to most engineers at the Commission and the office of telecommunications policy, they could be approved with only minor modifications of the rules, including shorter spacing, directional antennas, etc. Even if consideration begins as scheduled, the Commission will probably defer its decision. Most likely, the Commission will issue a notice of proposed rulemaking with reference to proposed changes in the VHF table of assignments to permit drop-ins in certain specified markets, and invitations for comment. Another 2 years probably will pass before a final decision. Unless there is continued Congressional oversight, FCC will probably take more than 2 years because the broadcast interests have much to lose and nothing to gain from drop-ins. There will most certainly be opposition by all three networks. Even if drop-ins are approved, the Commission will have to decide how to distribute the franchises. These decisions will be slow because many competing applications may be expected. Presumably, each new VHF station will serve a lucrative market. It could be nearly 10 years before the VHF drop-ins are assigned.

The Commission has done little original research on the VHF drop-in issue. An agreement to conduct engineering calculations was reached barely a year before the notice of inquiry. Collection of data for the Commission's decision was hampered by the absence of a coordinated effort between the Broadcast Bureau, the Office of the Chief Engineer, and the Office of Plans and Policy. The Commission knew the desires of interested parties but organized no plan to assess the issue. The first sign of progress came when the VHF drop-in issue appeared in the Commission agenda for April 1, 1975.

At that, the Commission scheduled the item for consideration without sufficient data. Had the item not been postponed, the Commission could not have been ready for its decision.

3. The UHF task force

The Commission recently has created an internal UHF task force under the direction of the Office of Plans and Policy, to set up a plan for dealing with requests for permission to use UHF. This task force,

with an analytical approach to UHF use, should have been established years ago. The plan currently under consideration is meant to determine how much of the UHF spectrum should be retained for broadcasting and how much might be available for other uses.

The creation of this task force demonstrates that the Commission can use its resources effectively. The Office of Plans and Policy will direct the work of the task force, with support by representatives of the Office of the Chief Engineer, the Broadcast Bureau, Safety and Special Radio Services, and the Common Carrier Bureau, among others.

The task force will evaluate possible uses of UHF for governmental aeronautical, maritime, land mobile, and individual citizens communications. A UHF plan will be useful to the Commission also in helping develop the United States position for the World Administrative Radio Conference to be held in 1979.

The Congress must remain alert to the disposition of the VHF drop-ins and the UHF band, to see that the public interest is served.

B. FAILURE OF THE LICENSE RENEWAL PROCESS

Although there are about 8,000 broadcast licensees in the United States, the Federal Communications Commission, absent a formal complaint, has never denied an application for renewal on the ground that the licensee had failed to serve the needs and interests of the community or failed to meet programming commitments.

1. *The Lamar life case: WLBT-TV, Jackson, Miss.*

In 1964, a group of black residents of Jackson, Mississippi, assisted by the Office of Communication of the United Church of Christ, petitioned to deny the renewal of the license of station WLBT-TV, licensed to the Lamar Life Broadcasting Company. The Communications Act states that a hearing must be held if "a substantial and material issue of fact" is raised in such a proceeding.¹⁵ The following issues were raised in the petition:¹⁶

(a) WLBT-TV informed the Commission on several occasions that in order to avoid violent reaction, it had a policy against selling or affording time locally for programming dealing with the issues of racial integration. Although the station turned down the request for time from the National Association for the Advancement of Colored People, it sold time for spot announcements in 1962 to the Jackson White Citizen's Counsel and presented editorials opposing racial integration of the University of Mississippi.

(b) The station's programming also raised a number of Fairness Doctrine questions.¹⁷ In presenting spot announcements and local programming favoring segregation, WLBT-TV had an obligation to broadcast the integrationist view. It could make no showing that it had done so:

(c) WLBT-TV appeared to be substantially ignoring the needs and interest of the black population, which represented 45 percent of

¹⁵ See Section 309(e), 47 U.S.C. 309(e).

¹⁶ *Lamar Life Broadcasting Co., Inc.*, 38 FCC 1143, 1153 (1965).

¹⁷ This doctrine requires broadcast licensees to afford a reasonable opportunity for the discussion of conflicting points of view on the controversial issues covered by them. See Section 315(a), 47 U.S.C. 315(a); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1968).

the population of Jackson, the community the station was licensed to serve; and

(d) WLBT-TV followed a pattern of cutting off network programs in which blacks appeared, on the basis of spurious claims of cable trouble.

Acknowledging that serious issues had been presented, the Commission nonetheless voted in 1965 to renew the license for 1 year by a vote of 4 to 2. Instead of ordering the hearing required by the Communications Act on the ground that "a substantial and material issue of fact" had been raised, the Commission renewed the license on condition that the licensee comply "strictly with the fairness doctrine," observe "strictly its representations to the Commission in this area . . ." meet with civil rights leaders, and cease immediately "* * * discriminatory programming patterns."¹⁸

On appeal, the Court reversed the Commission's renewal of the license of WLBT-TV, holding that hearing was necessary. The Court found that the Commission majority improperly shifted the burden of proof to the petitioning citizens' group and that in the conduct of the Commission there was "a curious neutrality in favor of the licensee. . ." ¹⁹

In a strongly worded opinion by Judge (later Chief Justice) Burger, the Court said: ²⁰

The record now before us leaves us with a profound concern over the entire handling of this case following the remand to the Commission. The impatience with the Public Intervenor, the hostility toward their efforts to satisfy a surprisingly strict standard of proof, plain errors in rulings and findings lead us, albeit reluctantly, to the conclusion that it will serve no useful purpose to ask the Commission to reconsider the Examiner's actions and its own Decision and Order under a correct allocation of the burden of proof. The administrative conduct reflected in this record is beyond repair.

Today WLBT is operating under an interim arrangement, pending the outcome of further FCC proceedings.

2. Broadcasters and license renewal

Even though broadcast licensees have a solid history of license stability, they are unrelenting in their pleas to the Congress and the Commission for "greater stability" and longer license renewal terms. In 1972, the FCC granted 99.32 percent of all renewal applications filed. In 1973, the figure was 99.19 percent; and in 1974, it was 99.69 percent.²¹

Only one station has lost its license as a result of a comparative hearing: the WHDH-TV case in Boston, one which was unique in other respects including allegations of *ex parte* contacts.²²

The number of licensees ²³ that have even been called for a hearing as a result of petitions to deny renewal of their licenses is infinitesimal, about 15 in the entire history of American broadcasting.²⁴

¹⁸ 38 FCC at 1153-54 (1965).

¹⁹ *Office of Communication of the United Church of Christ v. FCC*, 425 F. 2d 543, 547 (D.C. Cir. 1969).

²⁰ *Id.* at 550.

²¹ Hearings before the Subcommittee on Communications of the Committee on Commerce, U.S. Senate, 93d Cong. 2d sess., 352 (1974).

²² 16 FCC 2d 1 (1969).

²³ The Alabama Educational Television Commission case, 50 FCC 2d 461 (1975), involved a single licensee, but eight licenses and one permit. Although the licenses and permit were not renewed, AETC is still operating and has been permitted to apply for new licenses.

²⁴ FCC Records, e.g., Annual Report, Public Notices, and FCC Reports.

Broadcasting industry profits generally are high. Television stations in the top-100 markets usually make a pretax net profit of 30 percent or more on gross revenues, a high rate of return.²⁵

Nonetheless, broadcasters continue to complain about the brevity of the license term and the paper burden of applications for renewal.

In effect, broadcasters tend to look upon renewal of their licenses as a natural right. In view of the funds and effort they have invested, their attitude is understandable. It is the Commission's duty, nevertheless, to require that the use of the spectrum, a limited natural resource, satisfies standards which are in the public interest.

C. EXCESSIVE REGULATION OF THE CABLE TV INDUSTRY²⁶

Cable television developed in the United States from the late 1940's to the 1960's as a result of two basic flaws in the system of television allocation:

1. The Commission relied on a basic technology of single-channel, one-way, mass-message, supported by advertising revenue. The FCC seriously underestimated the size of the population base necessary to support a commercially-financed television station. There are today fewer than 900 television stations in operation. Of these, more than 500 are affiliated with one of the three major networks. As a result, many regions in the United States underserved by television broadcasts, were glad to obtain programs by cable.

2. The Commission, having erroneously mixed UHF and VHF channels in the same market, took no action to remedy the confused pattern of allocations which conferred a distinct economic advantage on the VHF stations, channels 2 through 13. The cable system contained the promise of programs supported by subscribers rather than advertisers.

Initially, cable TV brought television service to underserved areas. In the early 1960's, cable firms proposed to bring distant independent television signals to communities already enjoying full television network service. This venture threatened broadcasters in these markets, since it would subtract from the number of listeners who justify their advertising rates. The broadcasters reacted predictably.²⁷

They could hardly argue that cable TV unreasonably impaired their profits. Rather, they stressed that cable's operation impaired copyright privileges of competitive television programming and that cable would endanger the struggling new UHF independent stations.

In 1966, the Commission halted cable's development in the major markets on both grounds. The first ground, a matter of genuine concern, is a copyright issue recently resolved by the House Judiciary Committee rather than by the Commission.²⁸ As for the threat to UHF broadcasting, there were no substantial data to support this charge.

²⁵ See Broadcast Financial Data, published annually by the FCC. See note 14, *supra*.

²⁶ Liberal use has been made in this section of *Cable Television: Promise v. Regulatory Performance*, prepared by the staff of the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, U.S. Govt. Printing Office, Washington, D.C., January 1976.

²⁷ See Don R. LeDuc, "Cable Television and the FCC—A Crisis in Media Control," Temple Univ. Press, Philadelphia, 1973.

²⁸ The resolution by the House Judiciary committee, consisting of a system for payment of pro-rata fees, casts doubt on the validity of the FCC's use of the copyright issue to justify the restrictions imposed on cable TV in 1966.

Independent studies have consistently shown that cable would help, not hinder, major market UHF.²⁹ Yet the Commission, under the rubric of serving UHF, froze cable growth in the major markets until 1972, when it adopted the rules which prevail today.

Even then, in the face of new information that cable did no harm to UHF, the Commission's 1972 pay cable rules³⁰ reflect a choice not to clear the way for cable's development in the major markets. In a conservative stance, FCC said it would evaluate the situation after gaining experience. This action was further impaired because it was based on a consensus among private parties brokered by the White House rather than on an independent determination of the public interest by the Commission.³¹ In a more recent development as to pay cable, the Commission again compromised among the contending industries.³²

It is time for the Commission to abandon the role of referee for rival private interests and to consider whether the public interest is being served by its posture on cable television.

The FCC has predicted a bright future for cable television, but despite its statements that cable can open new outlets, promote diversity, and increase informational services, the Commission follows a policy favorable to VHF broadcasters. The Commission continues to deter work on a constructive policy.

The most serious flaw in the Commission's regulation of cable TV has been its policy of adopting rules based on a brokering of private interests and placing the burden of proof on cable firms to demonstrate that it will not substantially harm broadcasting. As a result, the recent history of deregulation of cable has been marked more by superficial tinkering with complex rules than a substantive lessening of regulation.³³ The failure of independent analysis at the Commission, coupled with cable's insurmountable task of proving itself not guilty, has led to a number of anti-competitive rules.³⁴ Competition in broadcasting should be encouraged. Individual elements in the industry may suffer but the industry as a whole will thrive on competition. Service to the public and diversity of choice, the Commission's mandated goals, should be fostered.

D. THE LAND MOBILE PROBLEM

Certain characteristics of the electromagnetic spectrum lend themselves to government regulation. Despite the demand for broadcast privileges, the spectrum has limits imposed by the paths of radio waves and the technology of radio communications. This characteristic

²⁹ See Rolla Edward Park, "Cable Television and UHF Broadcasting," *The Rand Corp.*, R-689-MF, January 1971. See also, Rolla Edward Park, "Potential Impact of Cable Growth on Television Broadcasting," *The Rand Corp.*, R-587-TE, October 1970.

³⁰ 36 FCC 2d 141 (Feb. 1972).

³¹ See testimony of Dr. Clay T. Whitehead, former Director of the Office of Telecommunications Policy, before the House Subcommittee on Communications, May 17, 1976. (Unpublished.)

³² Pay Cable rules of March 1975.

³³ *Fourth Report and Order*, 15 FCC 2d at 504-506. And in neither its 1970 *Report and Order* making the STV rules applicable to pay cable (20 FCC 2d 825, 828) nor in its 1975 action did the Commission cite any study and make any finding that restrictive rules are necessary on competitive (as contrasted with siphoning) grounds. See also *Memo-randum Opinion and Order*, 54 FCC 2d 797, 802 (1975), "... the problem addressed by the subscription rules is siphoning, not audience fragmentation . . ."; see also p. 880, par. 11.

³⁴ For example (a) the Commission ruled that a new movie may be shown by cable only in its first 3 years of its life and thereafter only after its 10th birthday.

(b) A cable operator may not bring in signals from another city if the broadcast competes with network programs in the same city.

of scarcity, of demand exceeding supply, is a basis for regulation. Another is the threat of interference that every transmitting device, even an electric razor, poses to other users. What might be called the suitability factor is a third reason for regulation; certain parts of the spectrum, better suited to economical use than others, are objects of intense rivalry. Land mobile communication (mobile radio senders and receivers on land) has these characteristics.

The popular demand for broadcast privileges is evident in the apparatus of land mobile radio. Antennas on rooftops; beepers on doctors; two-way radios in millions of vehicles used for police work, delivery, construction, and taxi cabs; telephones without connecting wires; EKG machines in ambulances; and now the popular Citizens Band (CB).³⁵ These are all land mobile, the generic name for hundreds of devices that are free of static landline connections.

The radio channels that have been allocated for land mobile number something short of 3,000, representing about five percent of available spectrum resources. A distinctive aspect of Land Mobile is that many users share the same channel, even in the same neighborhood, in contrast to broadcasters who are granted exclusive use of a channel. Land mobile communicating usually is one talker intermittently exchanging messages with an audience equipped to answer. Just as the telephone company designs a system on the assumption that not everybody will try to talk at once, land mobile systems operate "cochannel" on the theory that each user needs the channel only intermittently for a limited period.

Channel-sharing, the essential feature of land mobile, poses regulatory problems complicated by almost infinitely varied systems of equipment. Normally, a system will consist of a fixed transmitter (called a base station) and a lot of mobile or portable units. A base station may be located anywhere. The height of the transmitting antenna, or its power, or the distances over which the mobiles may travel, or the number and length of messages can vary infinitely.

There are in operation probably a half million base stations and millions of mobiles, all on only 3,000 channels. New users added this year alone will number almost 50,000, excluding CB.³⁶

1. History of land mobile

The many nuances to land mobile pose intricate regulatory tasks, but for present purposes the selection of frequencies is most relevant. Historically, frequencies have been assembled into blocks by the FCC and then allocated to the users of the parts of the spectrum assigned respectively to 24 discrete radio services: e.g. a police department would be eligible only for frequencies in the block allocated to the police service.

Block allocations and service groupings in combination were quite successful in cultivating the orderly growth of land mobile. Since like users were sharing the same channels, their operational require-

³⁵ The Commission now must regulate 15 to 20 million CB (citizen band) users. About 600,000 applications arrive each month. The Commission recently increased the number. Safety Administration has undertaken research on the safety consequences of this use of CB channels from 23 to 40, effective January 1, 1977. In addition to the serious crowding of that portion of the band, it has been suggested that there may be safety implications to be considered arising from the entertainment use of CB radios in private passenger cars. Informal discussions with its staff indicates that the National Highway Traffic Safety Administration has undertaken research on the safety consequences of this use, although it has no rulemaking proceedings planned on the subject at this time.

³⁶ Much of the information in this section is based on interviews with FCC personnel.

ments tended to harmonize. They used the resource efficiently with virtually no governmental intervention. "Frequency coordinators"³⁷ were authorized by the Commission to recommend specific frequencies to new applicants. These coordinators are private groups organized for the purpose of managing the block of frequencies available to a particular service, so that interference among users is confined and maximal benefit enjoyed. The virtue of the block allocation system was its simplicity.

Over the last 30 years, of the major inhabitants in the land mobile community, the FCC was the least active in system design and operation. Viewed from today's perspective, the Commission's reluctance to make judgments about how specific users of the spectrum went about their business was wise. Those rules that the Commission promulgated were designed generally to limit how many frequencies one user might have, or to guarantee the technical standards of the equipment proposed. In response to petitions from competing users or from those reflecting new demands on the spectrum, the Commission would allocate and reallocate the spectrum from one group to another; but allocations almost invariably came in blocks consisting of discrete frequencies. The extent of regulation by the Commission was to set general operating limitations, to enforce its rules in the field to ensure administrative and technical compliance with the rules (such as station identification, operating logs, etc.), and to see that the technical condition of equipment did not affect general use of the assigned channel.

Except in this limited sense, the Commission did not regulate land mobile services. Important decisions regarding the type and location of equipment, the size of a system, the power with which it operates, the frequency, or frequencies used were left to the applicant, equipment vendors, and frequency coordinators. Virtually without exception, the Commission accepted the coordinator's recommendations regarding frequencies and accepted the system parameters (power, antenna height, number of mobiles, etc.) specified by the applicant. This meant that the Commission gave no assurance that a system it licensed would perform to meet its intended purpose; nor did it assure that another applicant would not be licensed to operate on top of it. Assurances, to the extent that any were given, would come from the coordinator, the vendor, or the applicant's own technical staff.

The burdens of such an arrangement fell most heavily on the frequency coordinators. They were expected to find each new applicant an acceptable frequency and, simultaneously, insure that existing users could tolerate the addition.

The vendors of land mobile equipment played a prominent, if somewhat ill-defined, role in the operation of this system. It was extremely important for the vendor to know the pattern of usage so that a sale to a new user could be coupled with an acceptable channel recommendation. As a general proposition, any one of the principal equipment suppliers could supply radios that would satisfy a

³⁷ Frequency coordinators are private groups which petitioned the FCC to represent a particular radio service, and were given authorization by the Commission to make frequency recommendations. Most of them are organized on a volunteer basis.

customer's needs; therefore, other customer services the dealer provided with the radio became an element of possible competitive advantage. The result was two-fold: close relationships developed between the vendors and coordinators; and the vendor normally acted as his customer's agent in dealings with the Commission.

2. *Recent problems*

If there were unlimited spectrum resources available to land mobile, and if there were less potential for radio pollution, this pre-1968 situation might have persisted. Its success and growth, however, swept land mobile into a new relationship with the Commission that has generated a high-pitched controversy for the last 8 years.

The true test of a system is how well it works under stress. The land mobile system was strained in the early 1960's when the demand for frequencies began to exceed the Commission's ability to satisfy the petitioners. As land mobile is most in demand in cities, by business and industrial users and public safety agencies, the cities were first to learn that the spectrum did not admit every user access to a good channel. To continue its policy of unlimited access to the spectrum, the Commission used the only elasticity available: it decided to crowd more users on each channel and to bring facilities on the same channel closer to one another.

Temporary expedients, such as splitting some of the channels, served for a time, but the pace of growth clearly indicated a shortage ahead. The Commission ordered exhaustive studies by two competent groups, the Joint Technical Advisory Committee (JTAC) and the Advisory Committee for Land Mobile Radio Services (ACLMRS).³⁸ Numerous minor improvements were suggested along with two major proposals. The more obvious was to allocate additional spectrum to land mobile. Thereafter, in proceedings that consumed years of effort and controversy, the Commission reallocated chunks of spectrum from UHF television to land mobile.³⁹ A less obvious option was dubbed "spectrum management." The Commission chose to try this option also.⁴⁰

3. *Spectrum management*

The Commission issued a contract to Stanford Research Institute (SRI) to prepare recommendations for establishing a spectrum management program⁴¹ and followed with a Spectrum Management Task Force (SMTF) in the FCC's Office of the Chief Engineer. The elements of the new program were a monitoring capability to measure the utilization of the land mobile frequencies; a computerized data base including the technical details of all operating systems; and spectrum engineering programs to analyze the existing environment before selecting a frequency for a new user.⁴²

The intent was to reduce reliance on block allocations by identifying frequencies that were being under-utilized in one radio service, so that

³⁸ See "Report of the Advisory Committee for Land Mobile Radio Services," Vols. I and II, FCC, U.S. Govt. Printing Office, 1967, and also *Spectrum Engineering—The Key to Progress*, IEEE and EIA, New York 1968.

³⁹ FCC Docket Nos. 18261 and 18262 (July 17, 1968).

⁴⁰ FCC Docket No. 19150 (Feb. 3, 1971).

⁴¹ A study of Land Mobile Spectrum Utilization, Parts A and B, Stanford Research Institute, Menlo Park, California, 1969.

⁴² FCC Docket No. 19150 (Feb. 3, 1971).

users from other services might be assigned to them. The term "inter-service sharing" describe this entry of users from one service into the block of another. The long range intent was to reduce the existing number of blocks, then about 24, to no more than 4 or 5. The logic of this plan was deceptively simple: selective monitoring by SRI in New York, Detroit, and Los Angeles had shown dramatic under-utilization of many frequencies. The inference was drawn that there was an inherent rigidity of a block allocation system; not every radio service puts the same demands on its spectrum in each locale. The reasoning was that in urban areas of congestion, the Commission could not afford to let any channels go unused; therefore, the proposal for inter-service sharing was born.

With a strong foundation and with the quality of the preliminary work, this program of spectrum management was expected to achieve significant results. By January, 1973, an FCC pilot facility was operating in Chicago, equipped with computer programs for building a data base with monitoring vans for covering the Chicago Region (defined as 175 miles in radius from downtown Chicago) to collect channel utilization data. By 1974, there were engineering programs for selecting frequencies based on measured channel utilization and calculated interference probabilities. Today, the Chicago office of the Commission processes roughly 10 percent of all land mobile licenses, maintains a data base of 50,000 systems operating in the region, and selects a frequency without the participation of the coordinator.⁴³

The tools for developing spectrum management thus have been available to the Commission for the last several years, yet there has not been one instance of interservice sharing in Chicago or elsewhere. The reasons for this delay in reaching the intended goal of the program are complex, but there appears to be a critical factor. When the Spectrum Management program was conceived, the experts made innovative suggestions for introducing spectrum engineering into land mobile environment. Literally thousands of hours were dedicated to the search for the most effective tools for designing land mobile systems and selecting the best frequency for each user. It is difficult to put a value on the effort expended by the outside experts and by the Commission to design a system for managing the land mobile spectrum. It was, nonetheless, substantial.

The critical fallacy in the program, however, was an assumption that went virtually unexamined by the Commission and was scarcely questioned by the industry: the assumption that more Federal participation and control of the land mobile environment was needed to effect good spectrum management. The equipment dealers and the frequency coordinators and user groups filed voluminous pleadings in connection with the new program. One looks in vain, however, for a protest against the Commission's obvious intention to preempt the coordinator's role. Both the vendors and coordinators, for years, had exercised the responsibility for designing systems and selecting specific frequencies. The Commission's decision to take over this function was met with a chorus of protests on details of spectrum management but without a word against intrusion in the previously private sector.⁴⁴

⁴³ See FCC 1977 Budget Estimates submitted to the Congress.

⁴⁴ See Pleadings filed in FCC Docket No. 19150 (Feb. 3, 1971).

Looking back, it was the Stanford study that started it all. Its report, entitled "An Analysis of the Spectrum Problem", published in 1969, proposed a new assignment methodology based on the monitoring in Detroit and Los Angeles. In summary, it noted:

Currently, the user groups and their frequency coordinators, with the assistance of manufacturer's representatives, provide a significant part of the spectrum management and spectrum engineering performed for the land mobile users. The user groups have entered the spectrum management field because of necessity and because no other agency, including the FCC, has been able to accomplish the needed regional spectrum management task. Radio spectrum problems have become so acute in large urban areas and the task of performing the required regional frequency engineering and management has become so complex that the user groups do not have the resources, the capability, or the basic mission to solve these problems or to perform the task effectively. The diverse interests and goals of the user groups, their limited intergroup coordination, their lack of common procedures, their limited resources, and the absence of a common management system among them all indicate that they are inadequate for solving the regional spectrum engineering problems of the land mobile services. (at p. 62)

The user groups were not well equipped to do the job. Most were staffed by volunteers, generally moonlighting from regular jobs. Even the paid professionals were not spectrum engineers. Calculations were rough approximations. Record-keeping was haphazard. Lacking standards, the operating practices of the coordinators developed in a random fashion. There was little or no common thread to what was done.

Despite the accuracy of its facts, the Stanford report was wrong in its conclusion that the Commission must assume control of land mobile. The implication was that only the Commission possessed the necessary resources and talent to manage the spectrum efficiently. From the record of the proceedings, it does not appear that any serious consideration was given to reforming or revising the procedures of the private sector, or that there was any hesitation expressed at the size of the task assumed.⁴⁵

A stream of troubles flowed from the false premise that the FCC should be the sole guardian of spectrum management. On the eve of its most ambitious land mobile initiative, where the success of inter-service sharing would depend on the compatibility of users, the Commission eliminated the only experts in operating characteristics, the coordinators. With tunnel vision, the agency saw spectrum management as a control over the design details of individual radio systems, a task previously performed exclusively by the vendors. The result was strident opposition from a constituency that should have been supporting maximal utilization of spectrum. These initial responses, unfortunately, appear to have cut off the Commission from its natural partners. The result was the development of programs that did not evolve from an understanding of the marketplace.

Along with complete control of the program, the Commission also assumed its total cost. This aroused dissatisfaction with the program from those in the agency who resented this use of resources that might be put to better service.

A final loss was the weakening of the scientific aspects of the program because of the controversies that ultimately developed. Under normal circumstances, the industry's questions about the data col-

⁴⁵ Vols. I-V FCC Docket No. 19150 (Feb. 3, 1971).

lected by the Commission could have been answered with technically sound facts. But because of the industry's suspicion, the results of the Commission's efforts were no longer credible. In short, the Commission's preemption was unsuccessful; the controversy, prolonged.

It is unquestionable that the Commission acted in good faith. It is equally certain that the coordinators and vendors had interests to protect that were narrower than the public interest which the FCC is to represent. The thesis here is not that the specialized interest groups would have been able, unaided, to arrange more effective use of the spectrum. The issue is how the Commission's responsibility should have been exercised.

4. A new approach

In June, 1976, after months of study, the Commission chose another course.⁴⁶ From today's vantage, 8 years after SRI's work, the recommendations of the Commission's Office of Plans and Policy seem obvious. The intent is to correct the relationship between the Commission and the private sector. The Commission will withdraw from ad hoc involvement in radio systems but pursue its broad survey of the performance of the land mobile community. All of the Commission instruments will be retained but modified to meet the new purpose. The Commission may regain the confidence of the land mobile users by recognizing the roles of the coordinators and the vendors. The goal of maximum utilization of frequencies remains the Commission objective, but the process has been altered to enlist all forces that must synthesize their efforts to achieve channel sharing.

There is no guarantee that the Commission can reach this goal. Nor is there a guarantee that the vendors and coordinators will respond affirmatively and constructively. It does seem certain that the cooperative effort is worthwhile and that the outcome will be pertinent to the current debate over the scope of regulation.

E. REGULATORY AND ECONOMIC ISSUES IN INTERNATIONAL COMMUNICATIONS

International communications services consist of common carriers, companies which provide communications facilities to all customers. The customer may be an individual, a news agency, or a television network. Currently there are four major common carriers: The American Telephone and Telegraph Company (AT&T), also known as the Bell System, Western Union International, Radio Corporation of America Global Communications (RCA Globcom), and International Telephone and Telegraph Company (ITT). Of these four, AT&T handles exclusively all telephone and television communications to foreign points. The other three carriers are "record carriers", regulatory parlance for telegraph carriers. With few exceptions, ITT, Western Union, and RCA confine themselves to sending and receiving telegraph messages. As it does domestically, AT&T controls most of the international telecommunications market and owns most of its assets.

⁴⁶ "The Future of Land Mobile Radio," a report of the Spectrum Management Coordination Committee, FCC, June 25, 1976.

Before 1956, telegraph communication was the dominant electromagnetic channel between the United States and overseas. In that year, AT&T laid the first telephone cable across the Atlantic. Since then, AT&T has constructed several cables in collaboration with foreign government agencies. By the beginning of 1965, there were 240 telephone, or voice-grade, circuits across the Atlantic. The cables, called TAT-1, TAT-2 and TAT-3, cost \$133,000,000. A fourth cable, TAT-4, whose capacity is 138 circuits, cost \$46,000,000, and began operation in 1965. The newest cable, TAT-6, has 4,000 circuits. Whereas in 1963 fewer than 8 million overseas phone calls were placed, 207 million calls were placed to Europe alone in 1974.

Contrary to its predecessors, TAT-4 faced competition from an unexpected source: Early Bird, the first communications satellite, put into service almost simultaneously with TAT-4. The use of satellites for communication revolutionized the technology virtually overnight. Early Bird multiplied the number of channels and altered the structure of the industry. Satellite communication was to be the first of the dividends paid from the taxpayer's investment beyond the stratosphere. This growth added to the burden of the FCC, already straining to keep pace.⁴⁷

1. The Communications Satellite Act, 1962

The Communications Satellite Act,⁴⁸ introduced in Congress in 1962, was sharply debated in the Senate. To end a filibuster, the Senate voted cloture, 63-27, for the first time since 1927. Liberal Senators claimed that the bill would be "the biggest giveaway in the history of the United States." Senator Wayne Morse of Oregon called it "a monopolistic giveaway to AT&T." Specifically, the minority filibustered the bill because it believed that the taxpayer would be giving a private company, AT&T, a monopoly on technology which had been developed at taxpayers' expense and which should therefore be owned by the government for the taxpayers' benefit. They argued that AT&T was not to be entrusted with a medium so valuable to the public interest; that the bill would strengthen the AT&T monopoly on telephone communications. These Senators believed also that the FCC was incapable of regulating common carriers and would be ineffectual in regulating the Communications Satellite Corporation (Comsat), the corporation proposed by the Congress under the Act to operate, in conjunction with foreign governments, the international communications satellite system.

Nevertheless, the bill passed on August 17, 1962. Its supporters claimed that delay would impair the effort to maintain the edge in competition with the Soviet Union in outer space.

One objective of the Comsat Act was to set up a global communications network. Comsat was created at a time when global competition was viewed as bilateral: the Communists versus the Free World. The first two paragraphs of the Act stated that Comsat, the corporation that would own 30 percent of INTELSAT, the international telecommunications satellite consortium, was intended to provide communication to "less-developed" countries in order to fur-

⁴⁷ Michael Kinsley, "Outer Space and Inner Sanctums," John Wiley & Sons, New York, 1976; and FCC, Common Carriers Statistics, published annually.

⁴⁸ Public Law 73-624.

ther world peace and understanding. It was assumed also that INTEL-SAT would help the United States to counter Communist propaganda.

The Comsat Act also created a new type of corporation. Comsat was authorized to issue shares of stock like a private corporation, yet it was to work closely with the government and share in government technology and expertise. Its board of directors was to have both public and private representation. Since Comsat's creation, AMTRAK and the United States Postal Service (USPS) have been modeled along similar lines.⁴⁹

Comsat's quasi-governmental status tended to make it more powerful in the eyes of its critics who warned that it would be immune to the antitrust laws because of its semi-private, semi-public role. They warned that Comsat would be controlled by AT&T, which could purchase up to 50 percent of the stock, and would enjoy the prestige and backing of the U.S. Government.⁵⁰ (For a time, AT&T held 29 percent but now holds no shares.)

The authors of the bill attempted to guard against monopoly by stipulating that:

All authorized users should have non-discriminatory access to the system.

Maximum competition be maintained in the provision of equipment and services utilized by the system.

The FCC "maintain and strengthen competition in the provision of communication services to the public."

The FCC ensure that Comsat conform to the antitrust laws; and

The FCC ensure that any economics realized by satellite operation be reflected in the rates it charges.⁵¹

2. *A.T. & T. and Comsat*

Thus the Communications Satellite Corporation was born in controversy that continues to this day. One of the chief critics of the FCC, the common carriers (especially AT&T), and Comsat itself, is Michael Kinsley, the author of "Outer Space and Inner Sanctums," a history of the FCC's regulation of the United States international common carriers since the introduction of satellite technology in the early 1960s.

Kinsley charges that decisions by the FCC then committed Comsat to be an affiliate of AT&T rather than an independent competing company.

The first of these decisions arose out of a proceeding to determine who should own satellite earth stations. The earth station transmits message traffic to the satellite. The satellite receives the traffic and redirects it to another earth station, which relays the signals toward the terminus. Many believe Comsat should own earth stations in order to provide competition for AT&T's ground network of telephone lines and microwave stations.

With all the earth stations, Comsat would have a fully integrated network which could serve customers in the United States, such as General Telephone or Continental Telephone, now obliged to use AT&T's network. GTE and Continental telephone systems are islands

⁴⁹ Amtrak, 45 U.S.C. § 701 *et seq.* (1974); USPS, 39 U.S.C. § 1 *et seq.* (1970).

⁵⁰ These comments were voiced by a minority of Senators during debate on the act. Senator Wayne Morse (D-Oregon) was the principal opponent to H.R. 11040 in both the Senate Foreign Relations Committee (see Hearings before the Committee on Foreign Relations, U.S. Senate, 87th Cong., 2d sess., H.R. 11040, August 3, 6, 7, 8, and 9, 1962) and the Senate floor. The Kennedy administration supported H.R. 11040, including private ownership of Comsat.

⁵¹ Paraphrased from the Comsat Act, Public Law 73-624.

in a sea of AT&T communications gear. A GTE customer in Sarasota, for example, wishing to call another GTE telephone in West Los Angeles, must be routed through thousands of miles of AT&T territory. A satellite would give GTE its own channel.

If Comsat were permitted to offer its channels in direct competition to AT&T, the true cost of satellite versus cable transmission could be compared. Kinsley claims that satellite communication is far cheaper than AT&T's system.⁵² If "the carriers," principally AT&T, were permitted to own 50 percent of the stations, he alleged Comsat would become a vertical affiliate of AT&T, dependent upon it for most of its business.

In September, 1964, Comsat and a consortium of the common carriers (except for Western Union International) filed with the Commission respective claims for the exclusive operation of the earth stations. Both parties said that they needed to have exclusive control for "technical reasons." AT&T said that "if the proposed application (for Comsat to operate a second earth station in Etam, West Virginia) is granted on the basis of the technical characteristics [cited in Comsat's filing] there exists a serious hazard that the proposed facilities will interfere with existing domestic terrestrial communications . . ." Comsat then renounced its position that it should own the earth stations in favor of a compromise which gave to the carriers more than even their most ardent supporters among the FCC commissioners had advocated: in late 1966, it was agreed that Comsat and the consortium of carriers should share control of earth stations in the United States, each owning 50 percent of them.⁵³

By December 8, 1966, Comsat had trimmed its control by agreeing to grant the carriers ownership of half of the ground facilities and earth stations. AT&T's complaints that the stations would interfere with terrestrial communications facilities vanished when the 50-50 agreement was reached.

But the earth station decision was not the only one to limit the independence and competitiveness of Comsat. The FCC issued a series of "Authorized User" decisions, which have caused satellite economies to go unrecognized. The question in this skirmish was, "To whom should Comsat be permitted to sell its facilities?"

"It is the intent of Congress that all authorized users shall have non-discriminatory access to the system . . ." ⁵⁴ The debate centered over who should be an authorized user. Comsat supported the position, consonant with its theoretical role as a competitor to the other carriers, that it should be allowed to sell to anyone it pleased: television networks, private corporations, and even individual users.

The carriers said that they alone should be allowed to purchase Comsat circuits. They held that Comsat should be a "carriers' carrier", that is, Comsat should act as a wholesaler, selling circuits only to retail carriers.

The Commission ruled in June, 1966,⁵⁵ that Comsat could provide services only to other carriers, except in "unique or exceptional circumstances." It based this decision on the argument that otherwise Comsat

⁵² Kinsley, note 47, *supra*.

⁵³ 6 FCC 2d 183 (1966).

⁵⁴ Communications Satellite Act, 47 U.S.C. § 702(e) (1962).

⁵⁵ FCC 2d 12 (1966).

would be "cream skimming"; Comsat would take over the profitable business and leave the other carriers unable to subsidize unprofitable business with the profitable. This argument could be advanced only if it were true that satellite communications were cheaper than cable; yet at the time the carriers were claiming that their own cables were more efficient for overseas communications.

The Commission discarded the cream-skimming argument in 1969 in a case involving Microwave Communications Incorporated, which proposed to create a microwave network separate from AT&T's as a service to larger users. The Commission, in approving MCI's application, pointed out that MCI should have an opportunity "to demonstrate that its proposed minimum facilities will bring to its subscribers the substantial benefits which it predicts."⁵⁶

3. Satellite versus cable

Who should control the satellite earth stations? Who should be authorized to use Comsat's facilities? These would be academic questions were it not for the possibility that satellite communication may become far less costly than cable or microwave network transmission. This is one of the most keenly debated issues affecting Comsat. The private carriers staunchly maintain that cable is a cheaper mode of transmission than satellite. Comsat differs. Accounting methods, subsidies, and external costs and benefits are factors in this debate. Although cable carriers have been charging less per circuit than Comsat, Comsat has yet to take full advantage of its economies of scale.⁵⁷ The parity policy approved by the Commission provides that half of all overseas communications go by satellite and half by cable: this policy prevents Comsat from using its circuits to capacity. The cost of using additional circuits is almost nil for either mode. A single satellite, INTEL-SAT IV, has more circuit capacity than all overseas cables currently in operation. A fair comparison between the two modes would be based on what they charge per circuit given an opportunity to bid for all the business they can get. The Commission did not compare costs when it ratified the parity policy.

Questions that arise in this debate are: Why do carriers encourage use of cables? If satellites are more economical, don't the carriers suffer from using cables? Doesn't insistence on the parity rule imply that satellites are less costly? The answers lie partly in the concept of the rate base and partly in the doctrine that a family of facilities is essential to reliable and complete service.

4. The rate base issue

AT&T and all common carriers derive their income from the rate of return they are allowed to receive on their rate base. The rate base is

⁵⁶ When this point was argued in 1966, AT&T had three directors on the board of Comsat and owned 29 percent of its stock. In 1975, the corporation sold out its holdings, having concluded that the relationship with Comsat should be severed. The AT&T view also is that a complete communications service demands use of a family of facilities, e.g. satellite, cable, and microwave, each better suited to certain functions for economical or technical reasons than the other.

⁵⁷ Economies of scale are the gains in production and/or the reductions in costs resulting from an increase in the size of plant, firm, or industry. Economies of scale often result in a reduction in the number of firms in a given industry. Generally speaking, in telecommunications the most economic scale of production is large because of the vast amounts of capital needed. Consequently the firms tend to be few and large, and entry is relatively difficult. Economists refer to this type of situation as "oligopolistic competition," but the firms in telecommunications, because of their size, can increase their output or production with relatively little additional cost.

the total value of all the capital equipment and other authorized categories of property they own. If a company's capital and other assets included in the rate base are valued at \$1 billion, and its permitted rate of return is 7.9%, it will be allowed to set its rates so that it brings in a return of \$79,000,000 per annum. This return is usually used for further capital investment, for paying dividends to stockholders, or for paying bonuses.

A company may set rates for its services and receive a specified rate of return only when it has substantial market power or is a monopoly.

If a company dominates the market, government regulation is introduced to protect the public from abuses of the company's economic power. Since AT&T dominates the telecommunications channels, it is regulated along with other carriers by the Federal Communications Commission as well as by State authorities. The Commission's duty is to see that AT&T profits are "reasonable" and operations are "consistent with Federal antitrust laws."⁵⁸

It is evident that, in the present state of technology, a normal competitive market for telephone service could cause problems for consumers seeking to call parties served by a different company. Some can still remember the annoyance experienced from early local competition between two or more rival telephone companies. As the successful competitor in this rivalry, with approval of regulatory commissions, AT&T came to own 5 out of 6 telephones in the United States and almost all long-distance land lines, not to mention most of the terrestrial equipment for both domestic and international communications. Other telephone companies today are natural monopolies for discrete towns or regions. By law, Comsat has a monopoly on overseas communication by satellite: it owns all satellites for overseas service and controls access to their circuits. If private carriers wish to use these circuits, their uses of satellites are limited by the parity policy: half the messages must go by cable, owned mainly by AT&T.

In the science of regulatory economics, a model known as the Averch-Johnson effect⁵⁹ demonstrates that companies which earn their profits as a percentage of their capital investment may invest excessively in capital facilities, even if the facilities are less efficient and hence more expensive, because, whatever they invest, they still can expect to earn more money from their total operations, provided they do not exhaust the market for their services.

Cables are part of the rate base, whether or not that is the reason AT&T favors their use. Each time AT&T constructs a \$200 million cable, this amount is added to its rate base for the cable's first year of

⁵⁸ Communications Act of 1934, § 1, § 314, 47 U.S.C. § 702(c).

⁵⁹ Alfred E. Kahn, of Cornell University defended the Averch-Johnson effect in "The Economics of Regulation Principles and Institutions" Vol. II, p. 49 (1971): "The A-J-W effect: As we have already pointed out, the combination of incompletely exploited monopoly power and a rate of return in excess of the marginal cost of capital, both of which regulation is likely to entail, also involves certain dangers. The very incentives to expansion of investment and output to which they give rise may instead be regarded as distortions, tending to produce inefficient results. As Averch, Johnson, and Wellisz, among others, have pointed out, this combination of circumstances may induce public utility companies to make investments the social benefits of which fall short of their social costs, because (1) such investments will expand the rate base on which the companies are entitled to a rate of return in excess of the cost of capital and (2) to the extent that the net revenues directly generated by such incremental investments fall short of yielding the allowed rate of return, they can recoup the revenue of deficiencies by raising their rates in markets in which they have hitherto been prevented from pricing at profit-maximizing levels. These considerations could induce them (1) to adopt an excessively capital-intensive technology and (2) to take on additional business, if necessary, at unremunerative rates."

operation. The cable will continue to count in the rate base on a declining scale until it is fully depreciated in 24 years. As a monopoly, AT&T has good reason to assume that, whatever amount of money it invests in cables, its total income will assure a high rate of return on its total investment. But AT&T has learned also that by reducing rates for long distance at slow times it has increased earnings. So it is not entirely dependent on the rate base for its profits. When times are bad, moreover, AT&T revenues could fall so low that it could not possibly earn a profit.

It may be that the carriers had a strong interest in limiting the competitive power of Comsat as much as possible, via the earth station and authorized users decisions, because they wanted to keep their volume and earnings high.

Were Comsat able to compete with AT&T and the other carriers, the relative advantages of satellite service would be discernible.

Not revenues but the rate base factor may explain why the carriers have advocated construction of still more cables. Although intangibles such as "diversity and reliability" are the basis of AT&T's insistence that cable and satellite traffic be split evenly, this 50-50 ratio has left thousands of satellite circuits idle. The result is that satellite per-circuit operating costs at present traffic levels are higher than those for cables. The carriers' claim that cables are cheaper is validated mainly by FCC's refusal to let Comsat operate at full capacity.

The Act does not give definitive guidance on this issue.

[The FCC shall] * * * grant appropriate authorizations for the construction and operation of each satellite terminal station, either to the corporation or to one or more authorized carriers or to the corporation and one or more such carriers jointly, as will best serve the public interest, convenience and necessity. In determining the public interest, convenience and necessity the Commission shall authorize the construction and operation of such stations by communications common carriers or the corporation, without preference to either.

5. Regulatory options

The current interrelationship of Comsat and the other carriers, as overseen by the Commission, is not as clear as it should be.

There appear to be two useful options in the current regulatory framework: either the government can take over Comsat and run it much as it now runs the Tennessee Valley Authority; or the government can maintain the status quo and improve regulation by having Comsat conform to the policies of the Communications Satellite Act of 1962. Both options presuppose strong regulation by the FCC. To date, the Commission has proved itself unwilling or unable to combat the power of the private carriers on behalf of competition and diversity. Would a government satellite agency compete more successfully with private carriers?

Future evaluation of the performance of the Commission will depend in part on its ability to address these questions.

F. THE REGULATION OF A.T. & T. AND THE TELEPHONE INDUSTRY

Writing in the March, 1913, issue of *Atlantic Monthly*, American Telephone and Telegraph Company President Theodore Vail held that "[t]he vicious acts associated with aggressive competition are

responsible for much, if not all, of the present antagonism in the public mind to business, particularly to large business."⁶⁰

Public mistrust of big business in general and the Bell System (AT&T) in particular, combined with this corporate approval of regulation, resulted in a general extension of regulation over telephone utilities by State and Federal Governments. From 1910 until 1934, Federal regulation, as exercised by the Interstate Commerce Commission, could be called *somnambulant*. The most dramatic ICC action was to adopt a Uniform System of Accounts to be used by telephone companies, based on AT&T's internal accounting system.

With the Communications Act of 1934, the ICC's regulatory authority over communications transferred to the Federal Communications Commission. The history of telephone regulation by the FCC may be divided into two periods; the first, a time of negotiated rate reductions, ran until the decision in 1959 to permit competing private microwave carriers; the second, with an emphasis on competition and adjudication, comes to the present.

1. 1934-1959: Negotiated rate reductions

Technological improvements and economies of scale dramatically reduced the costs of long distance telephone communication in this period. As a result, the FCC was able to negotiate a continuing series of rate reductions for interstate calls. The process was informal. The Commission would take notice that the reported earnings of AT&T long lines had crept to a high level. This was an imprecise way to determine the return on AT&T's interstate business since the operating companies which served large State areas also provided interstate services. Apparently, the FCC simply assumed that if earnings were high in AT&T's long lines, then they were similarly high on the interstate lines of the operating companies. Unfortunately, as the Commission had elected to adopt the accounting system which had been employed by the ICC, data were not available in usable form to permit a precise estimate of AT&T's return on interstate investment. The Commission also assumed correctly that AT&T would increase both service and profits by reducing rates in slow times.

Following negotiations, a rate reduction would be announced by the Commission, then AT&T would file new tariffs reflecting the agreements.⁶¹

The process of regulation was simple and uncontroversial, proceeding as it did out of the public eye and without the contentiousness of formal rate proceedings. Of course, the regulatory agency's responsibility to ensure that rates are just and reasonable requires not only that the revenues of the company are sufficient to compensate for the use of its facilities but also that the rate base—i.e. the cost of plant and equipment—is not excessive. This is reflected in Section 214 of the Communications Act which requires FCC approval of new interstate lines or extensions of existing lines in advance of their construction. As executed by the Commission, this requirement might appear to

⁶⁰ Vail, "Public Utilities and Public Policy," *Atlantic Monthly*, p. 309 (March, 1912).

⁶¹ See for example the 1946 Annual Report of the FCC to the Congress. By this time negotiated rate reductions had exceeded \$100 million.

have been a formality of putting a public stamp of approval on privately determined construction plans.⁶²

This state of affairs was disturbed by a conflict between State and Federal jurisdictions. Section 214 of the Communications Act grants the FCC regulatory control over telephone lines used for interstate purposes. But, in order to complete a long distance call, a caller uses a local loop (the wire running from the customer's premises to the central office) and an interstate long distance line. In order to determine interstate and intrastate revenue requirements, it is necessary to arrive at some agreed upon separation of the complete telephone system's local and interstate costs. Historically, board-to-board separations were employed, i.e., the interstate rate base was deemed to consist only of the long distance wires and associated expenses running between local exchanges. No part of local exchange costs was allocated to the interstate rate base. Hence the regulatory program was consistent: the FCC had authority to authorize construction of interstate lines and responsibility for the revenue requirements they generated.

In a landmark case decided even before the adoption of the Communications Act of 1934, however, the Supreme Court ruled that the interstate rate base must include some portion of local exchange costs.⁶³ In most jurisdictions, this requirement was met by transferring from the intrastate to the interstate jurisdiction a portion of both the costs and revenues of local telephone service, so that the effect was to nullify the Court's decision. For AT&T, this transfer was simply an accounting change without an operational effect.

The Court's decision was the source of decades of regulatory conflict and dispute. State regulators are elected officials whose performance the voters are likely to compare with Federal performance. Interstate rates were declining as a result of a series of negotiations between AT&T and the Federal Communications Commission, while rates for local telephone and intrastate toll service were either stagnant or increasing. This disparity looked bad for the State officials.

In this context, State officials sought a shift of assets used in calculating the rate base to the interstate jurisdiction. Accountants could transfer a portion of the costs previously part of the rate base for intrastate revenues to the interstate regulators.⁶⁴

This conflict diverted attention from basic issues important to telephone users as a whole by causing State regulators to argue that asset shifts, rather than aggressive regulation, are the vehicle for ensuring reasonable local telephone rates. They have done this by repeatedly proposing to the Commission (in lieu of interstate rate reductions) that new separations procedures, each more arbitrary than the preceding, be employed to shift parts of the rate base from intrastate to interstate jurisdiction. Eventually, outside support for this position led the Commission to acquiesce in the proposed separations.

⁶² Though the Commission is required to ensure that new construction plans were in the public interest, it lacked the staff or commitment to engage in effective review of these plans. 47 U.S.C. § 214(a).

⁶³ *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930).

⁶⁴ It should be emphasized that this exposition is in no way intended as an argument that interstate telephone users should not bear any portion of the costs of local telephone equipment which make interstate communication possible. It is simply intended to indicate the result of the Court's decision in *Smith v. Illinois Bell*, 282 U.S. 123 (1930), has been to build into the system of Federal/State regulation of telephone rates a never-ending jurisdictional conflict which has severely hampered the effectiveness of regulation on both levels.

The Commission during this period tended to stand by while the State regulators and the telephone companies negotiated separation changes.⁶⁵ The Commission did initiate a formal proceeding on separations in the early 1940's, but no action was taken until 1967 when the Commission took its first official action on separations.⁶⁶

In summary, the period 1934-1959 was characterized by an informal and extremely limited regulatory practice by the Commission. When interstate earnings appeared to be excessive, the FCC would negotiate reductions with the carrier. This process often was contested by separations change proposals from the State regulators with the aim of transferring revenue requirements from the State to the Federal jurisdiction. The FCC neither approved nor disapproved of these procedures, which are at the heart of regulation. It interposed no objection to their use on an interim basis, a period that lasted approximately 20 years.⁶⁷

2. Competition revised

Since the time of President Theodore Vail, AT&T had aimed at control over the telephone system. For example, it opposed the effort of another company to market a plastic cup for the mouthpiece to provide privacy for telephone conversations. In 1959, the Commission adopted the first of a set of decisions which permit competing suppliers to enter certain submarkets of the telephone system.⁶⁸ The first of these was the microwave decision which held that businesses that could justify the construction of a microwave communication for their internal use would no longer be prohibited from installing their own system. AT&T responded by offering discounts to large business communications users. The governing documents are known as TELPAK.⁶⁹ AT&T discounts appeared to depart from Vail's policy of using profits from commercial sales to offset losses incurred from uneconomic services to households. Recently, the Commission brought the 17-year inquiry to a conclusion, by determining that the discounts were "unjustly discriminatory" and did not constitute a "proper competitive response to . . . competition from private microwave and other carriers."⁷⁰

The TELPAK rates set the stage for a broad telephone investigation, which has continued to the present. In response to criticism from Western Union, which claimed that AT&T used revenues from its interstate monopoly to subsidize services which competed with those of Western Union, the Commission ordered AT&T to conduct a study to determine its rates of return on investment for interstate services.⁷¹ This information had not been disclosed by the FCC's Uniform System of Accounts. The study, while subject to criticism, showed widely disparate rates of return for competitive and monopoly services. It formed the principal justification for the establishment of Docket No. 16258, which was to be a thorough investigation of issues regard-

⁶⁵ See Richard Gabel, "Development of Separations Principles in the Telephone Industry," Institute of Public Utilities, Division of Research, Graduate School of Business Administration, Michigan State Univ., East Lansing, Mich., 1967.

⁶⁶ Phase IA of Docket No. 16258, 9 FCC 2d, 30 (1967).

⁶⁷ 22 FCC 122 (1957).

⁶⁸ 27 FCC 359 (1959).

⁶⁹ "Seven Way Cost Study," submitted by AT&T to FCC in Docket No. 14650, Sept. 10, 1965.

⁷⁰ FCC News Release, Sept. 23, 1976, Designated Report No. 12343.

⁷¹ 32 FCC 2d 691, 692 (1971).

ing telephone regulation principally the rate base. It is fair to conclude that the issues set for resolution in Docket No. 16258 are at the root of an effective regulatory program. Unfortunately, the Commission has not been able to resolve many important issues, such as what constitutes predatory pricing of a competitive service. An Administrative Law Judge, in a 530-page report to the Commission in August 1976, recommended decisions generally favorable to AT&T but the Commission is not expected to rule finally until 1977.

The Commission has authorized further competition in the telephone industry with decisions which have resulted in unparalleled controversy. It extended the microwave decision by allowing specialized carriers to offer private line service in direct competition with AT&T.⁷² Subsequently, it adopted an open sky policy for domestic satellites which has led to a forecast that at least 8 competing satellites will be launched, notably an IBM-Aetna-Comsat combination, General Telephone, and RCA.⁷³ In the *Carterfone* decision, the Commission ruled that competing suppliers of terminal equipment (everything from data communications terminals and automatic dialers to extension telephones) might sell their wares to the public as long as the equipment does not harm the basic telephone network.⁷⁴

These decisions prompted many firms to come up with new products and services which AT&T has since elected to match. This competition arises at a time when the communications technology is taking a quantum jump. What has been until now primarily "pots" (plain old telephone service) is amplified by electronic mail, electronic data transfer, electronic funds transfer, and a host of other new services. The Commission deserves major credit for promoting this transformation. At the same time, the new technology emphasizes shortcomings in the Commission's regulatory program. The Commission has found itself without standards for judging the competitive position of AT&T. As a result, many AT&T practices have been in effect for a substantial period without a satisfactory showing of their reasonableness, even though the Communications Act of 1934 clearly places the burden of proof on the carrier to produce such evidence. At least one competitive action of AT&T, the HI-LO rates,⁷⁵ remains in effect despite the fact that the Commission has found these rates to be unlawful.⁷⁶

The Commission has come under increasing criticism for its delay in establishing what may be called the ground rules of competition. Some of this criticism is deserved. Some fault lies with competing private interests which misuse the guarantee of due process to delay regulation when delay is in their interest.⁷⁷

⁷² 35 FCC 2d 844 (1972).

⁷³ 24 FCC 2d 318 (1970).

⁷⁴ 12 FCC 2d 420 (1968).

⁷⁵ 43 FCC 2d 821 (1973).

⁷⁶ The HI-LO Tariff filed by AT&T on November 14, 1973, was a major response to the new threat of competition from specialized inter-city carriers. AT&T says that its rates have been based on an average of costs for lower-cost, high density service and higher-cost, low density service, which allows competitors to "cream-skim." The high density routes produce higher revenues and, presumably, higher profits. AT&T accuses its specialized common carrier competitors of entering only the high density, high profit services in order to "cream skim" while ignoring the more remote, less profitable, areas.

⁷⁷ For example, even though the Commission had explicitly articulated its policy of allowing specialized common carrier competition, AT&T impeded that policy by refusing cause proceeding, directed AT&T to cease and desist from violation of its orders. 46 FCC 2d 413 (1974).

In addition to the difficult task of establishing ground rules for competition, the Commission has the burden of arguing against protracted appeals of its decisions in the courts and in the Congress. The industry has supported legislation to overturn the decisions to increase competition. (H.R. 12323, 94th Congress.) The arguments favoring this legislation do not differ markedly from those advanced by Vail in 1913. AT&T claims to have cooperated with regulators in establishing a pattern of subsidization of local telephone rates at the expense of business and long distance users, as noted above. Competition, it is argued, threatens to undermine this explicit pattern of subsidization.⁷⁸ Passage of H.R. 12323 would set definite and narrow limits for the Commission's jurisdiction. The Commission's policy toward telephone systems is uncharacteristic of its general treatment of competitors like cable television and of the usual concern shown by regulatory agencies for established business patterns. The Commission has not, since 1959, acted to preserve the markets of the telephone companies. After protracted consideration, it has encouraged competition in limited parts of the telephone business where it has decided that the public interest would be served.

The Courts have ruled that these decisions are within the Commission's authority and were reached by due process.

One consideration regarding H.R. 12323 is that its passage may be a signal that regulatory agencies must reckon with the possibility that the Congress may overturn decisions which arouse strong objections. AT&T witnesses have advocated a return to the regulatory policy characteristic of the period 1934-1959, which recognized the telephone system as a monopoly.⁷⁹ In that event, the FCC would be limited to assuring that earnings did not stray from reasonable levels. Managerial discretion of the telephone companies would prevail, free even from limited competition.

Important unanswered questions have delayed Commission decisions, with significant consequences for AT&T and the public. In part, these suggest legislation will be needed to strengthen the Commission so that it can obtain data needed for the answers. The analytical resources, the data base, the personnel, and the legislative mandate need to be adjusted to the dimensions of the industries and the variety of interests created by modern technology.⁸⁰

V. Conclusions and Recommendations

The Federal Communications Commission, laboring in a difficult field, shows some promise of recovering from a history of passive acceptance of the needs and demands of narrow commercial interests, a history of mild regard for its statutory mandate to protect domestic competition and diversity in the public interest. Without a firm, consistent policy, the Commission has been vulnerable to all manner of conflicting pressures, inducing delays and inaction.

⁷⁸ See for example the testimony of AT&T witnesses at the hearings before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, House of Representatives, 94th Cong., 1st sess., on Domestic Common Carrier Regulation, Serial No. 94-100 (1976).

⁷⁹ See Domestic Common Carrier Regulation hearings, *ibid*.

⁸⁰ See "Fundamental Changes Needed to Achieve Effective Regulation of Communications Common Carriers," prepared by the staff of the House Subcommittee on Communications, Washington, D.C., Nov. 10, 1975.

We find that the Commission, despite recent improvement, has been wanting in vision and consistency of policy.

It has failed to realize the potential of cable TV and UHF. It has given insufficient thought to the uses of broadcasting in the public interest. It has vacillated between protection of established interests and the protection of competition to the extent that it has over-regulated land mobile and cable TV but neglected its responsibilities in license renewal.

We also find that the Commission has been unduly influenced by representations and information furnished by the regulated industries.

Consequently, the Commission has tended to resist competition and new developments in communications technology. It has misallocated uses of the spectrum, subjecting it to wasteful and unproductive use, and it has failed to clarify the issues relating to Comsat or to determine the validity of the conflicting claims of contending interests.

Therefore, we recommend:

1. that the process of recruitment, selection, and appointment of Commissioners be modified in line with recommendations elsewhere in this report to assure that Commission members are well qualified to serve in the public interest;

2. that the Congress intensify its oversight function to strengthen and assist resolution of Commission policies;

3. that the Commission include members who are well acquainted with the technical, commercial, and economic aspects of communications;

4. that the Commission request and Congress approve staff and budget to conduct independent research in matters ordinarily reported only by the regulated industries; and

5. that the Commission provide for procedures which will assure broad representation of all parties concerned with its decisions: the users of the communications equipment, the vendors, and employees, no less than operators and investors.

BIBLIOGRAPHY

- Acard Brinton, *The Regulation of Broadcasting by the FCC: A Case Study in Regulation by Independent Commissioners*, Harvard University Press, Cambridge, Massachusetts, December 1962.
- Henry J. Friendly, *The Federal Administrative Agencies*, Harvard University Press, Cambridge, Massachusetts, 1962.
- Henry Geller, *A Modest Proposal to Reform the Federal Communications Commission*, The Rand Paper Series, Santa Monica, California, April, 1974.
- Alfred E. Kahn, *The Economics of Regulation*, Volumes I and II, John Wiley and Sons, New York, 1970 and 1971.
- Jordan Richard Kerner, "The Communications Satellite Corporation: Toward a Workable Telecommunications Policy," *The Hastings L. J.*, Vol. 27, No. 3, pp. 721-752, January, 1976.
- Michael Kinsley, *Outer Space and Inner Sanctums*, John Wiley and Sons, New York, 1976.
- John Michael Kittross, *Television Frequency Allocation Policy in the United States*, an unpublished Ph. D. dissertation, 1960, available from University Microfilm, Ann Arbor, Michigan.
- Michael W. Klass and William G. Happerd, *Regulation and Entry*, MRS Public Utilities Papers, East Lansing, Michigan, 1976.
- Erwin Krasnow and Lawrence Longley, *The Politics of Broadcast Regulation*, St. Martin's Press, New York, 1973.
- Newton Minow, *Equal Time: The Private Broadcaster and the Public Interest*, Atheneum, New York, 1964.

- Roger Noll, Merton Peck, and John McGowan. *Economic Aspects of Television Regulation*, The Brookings Institution, Washington, D.C. 1973.
- Roger Noll, *Reforming Regulation*, Brookings Institutions, Washington, D.C., 1971.
- Rolla Edward Park, ed., *The Role of Analysis in Regulatory Decisionmaking: The Case of Cable Television*, The Rand Corporation, Santa Monica, California, December, 1972.
- Alan Pearce, *The Economics of Network Children's Television Programming*, The Federal Communications Commission, Washington, D.C., July, 1972.
- , *The Economics of Children's Television: An Assessment of the Impact of a Reduction in the Amount of Advertising*, The Federal Communications Commission, Washington, D.C., June, 1974.
- , *The Economics of Prime Time Access* (A study of the broadcasting and program production industries), The Federal Communications Commission, Washington, D.C., September, 1973.
- , "The TV Networks: A Primer," in the *Journal of Communication*, Fall, 1976, Vol. 26, No. 4.
- Staff of the Subcommittee on Communications, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, *Fundamental Changes Needed to Achieve Effective Regulation of Communication Common Carriers*, U.S. Government Printing Office, Washington, D.C., 1975.
- , *Interim Report and Recommended Courses of Action Resulting from the Hearings on Telecommunications Research and Policy Development*, U.S. Government Printing Office, Washington, D.C., 1975.
- , *Compendium of Papers Supplementing the Hearings on Telecommunications Research and Policy Development*, U.S. Government Printing Office, Washington, D.C., 1976.
- , *Cable Television: Promise versus Regulatory Performance*, U.S. Government Printing Office, Washington, D.C., 1976.
- , *Agenda for Oversight: Domestic Common Carrier Regulation*, U.S. Government Printing Office, Washington, D.C., 1976.
- Harry M. Trebing, ed., *Essays on Public Utility Pricing and Regulation*, MSU Public Utilities Studies, Michigan State University Press, East Lansing, Michigan, 1971.



FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 8

FOOD AND DRUG ADMINISTRATION

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CHAPTER 8

FOOD AND DRUG ADMINISTRATION

I. Summary

The Food and Drug Administration (FDA) was formally established in 1906 by the Pure Food and Drugs Act. By 1976, the Agency had acquired additional statutory responsibilities, including particularly the Federal Food, Drug, and Cosmetic Act of 1938, as amended. The current budget is \$245 million and covers 7,200 employees. The primary mandate for FDA is to insure the safety and effectiveness of foods, drugs, and devices. The performance of the Agency has suffered repeated criticism, particularly inadequate public protection. Its achievements, being largely preventive, are not so well recognized.

The Subcommittee studied seven cases pertaining to product regulation and agency procedures. In 1965, University of Wisconsin scientists reported that nitrofurans, used in animal feeds, were tumorigenic and possibly carcinogenic. These drugs are still on the market. The nitrofurans case demonstrates excessive delay, inadequate scientific methodology, and reluctance to use the power to remove an "imminent hazard" from the market.

Since 1972, there have been a number of recalls of defective cardiac pacemakers. FDA did not observe its own protocol to examine samples of recalled products and inspect manufacturing facilities, nor did it consult its legal counsel. The Agency's failure to execute its enforcement responsibilities points to a need to assure observance by staff of its own regulations, failure to verify manufacturer reports, and a need for comprehensive safety and performance standards.

The Subcommittee's third study was of chymopapain. Chymopapain was approved only for investigative purposes in 1963. In this status, it was used on approximately 15,000 patients. In 1967, reports appeared about adverse effects, including paraplegia and death, among these patients. Despite a lack of sound scientific justification, the manufacturers nevertheless applied for permission to sell chymopapain generally. In the lengthy assessment of this application, FDA did not require controlled studies but rather relied on inadequate data from the drug's manufacturer.

The study of chymopapain also raised doubts about the agency's use of its advisory committees, which have a propensity for closed meetings and going off the record. The Subcommittee believes that, as such committees may be pressured or influenced, the rationale for closing these meetings is questionable. These meetings virtually always should be opened to the public.

Tumors were associated with chloroform 30 years ago; cancers were detected in 1972 by the National Cancer Institute (NCI). FDA took no official notice until NCI's formal report was published in March

of 1976. Such failures in exchange of scientific information expose the public to dangerous risks far longer than necessary.

This lack of coordination appears also in an overlap of jurisdiction between FDA and the Department of Agriculture. When residues of ipronidazole were found in turkey meat, Agriculture agents impounded the wrong lot of turkeys by mistake. Though the error was brought to the attention of FDA's Bureau of Veterinary Medicine, FDA did not act because (as stated in a Bureau memorandum) the public disclosure might embarrass Agriculture. The contaminated meat was processed and sold. The cover-up by FDA, to say the least, is not consistent with its mandate to protect the public.

The Subcommittee examined FDA guidelines for employee standards of conduct and their implementation to determine whether they guard against potential conflicts of interest. Even an appearance of such conflicts may damage public confidence and hinder FDA's exercise of its regulatory responsibilities. Agency regulations on divestiture appear to be lax. Also we find excessive delays on rulings. The Agency has admitted that enforcement has been insufficient.

The Subcommittee recommends:

- (1) That FDA apply the total range of its powers conferred by Congress, and request additions if necessary;
- (2) That FDA expedite decisions on applications for the introduction of new drugs without sacrificing sound scientific protocol as the basis for decisions;
- (3) That FDA monitor industry activities more conscientiously to insure that proper standards are maintained, with less reliance on assurances of the manufacturer;
- (4) That FDA enforce strict regulations on employee security holdings and monitor exchanges of personnel between the Agency and regulated firms;
- (5) That FDA advisory committee meetings be open to the public in conformance with the Federal Advisory Committee Act;
- (6) That FDA establish procedures to assure effective coordination with activities of other departments, agencies, and bureaus; and
- (7) That FDA require acceptable scientific protocols and monitor industry testing and recalls conscientiously.

II. Mandate

The Food and Drug Administration (currently an operating Agency within the Department of Health, Education and Welfare (HEW)), was formally established in 1906 under the Constitution's commerce clause with President Theodore Roosevelt's signing of the Pure Food and Drugs Act.¹ FDA assumed responsibility for regulating the interstate commerce of misbranded or adulterated foods and drugs; the Agency received the authority, 3 years later, to set minimum standards of quality for canned goods also.²

FDA's present role was defined most closely by the Federal Food, Drug, and Cosmetic Act (FD&C Act) of 1938, which established the clinical investigation and reporting criteria—necessary prior to approval of applications—for premarket testing of the safety of new

¹ 34 Stat. 768, June 30, 1906.

² 21 U.S.C. 341.

drugs.³ In addition, the Act gave FDA limited jurisdiction over cosmetics and medical devices. It also provided various enforcement capabilities and allowed FDA to set tolerances or limits on the presence of dangerous substances. With the Kefauver-Harris amendments to the Act in 1962,⁴ manufacturers were required to prove to FDA not merely the safety of drugs before marketing but their effectiveness.

Today, FDA's mandate is to insure that (1) food is safe and wholesome, (2) drugs, biological products, therapeutic devices, diagnostic products are safe and effective, (3) cosmetics are safe, (4) the use of radiological products does not result in unnecessary public exposure to radiation, and (5) all of these products are honestly labeled.

With appropriations for fiscal year 1977 set at \$245,102,000 and with 7,200 employees, FDA, through the exercise of its regulatory functions, has heavy responsibilities for protecting public health. (Table 1.) The Agency assigns its various duties to divisions or sections charged with executing discrete programs.⁵ Agency officials also coordinate their activities with those of other related Federal agencies.⁶

TABLE 1.—FOOD AND DRUG ADMINISTRATION, BUDGET AND PERSONNEL, 1971-77

	Fiscal year—						
	1971	1972	1973	1974	1975	1976	1977
Appropriations 1.....	\$89,549	\$99,681	\$154,123	\$183,277	\$196,356	\$222,000	\$245,102
Personnel.....	4,560	5,198	6,189	6,324	6,482	6,519	7,200
Field.....	2,086	2,190	2,759	2,694	2,732	2,771	-----
Headquarters.....	2,474	3,008	3,430	3,630	3,750	3,748	-----

¹ In thousands of dollars. Excludes funding for certification, and advancements, and reimbursements.

FDA responsibility for regulation of drugs intended for human use includes premarket evaluation; monitoring marketed drugs for adverse reactions; regulating the advertising and promotion of prescription drugs; and establishing and monitoring standards for use, labeling, and composition of drugs.⁷ The Agency has responsibility for the regulation of several hundred thousand prescription and over-the-counter drugs which are manufactured by about 3,500 firms.⁸

Since 1972, the Agency has had the responsibility also of assuring that biological products used for the prevention, diagnosis, and treatment of disease are safe, potent, and effective. Included in the Agency's jurisdiction are the Nation's blood banks, which are governed by a comprehensive set of Federal guidelines to improve the protection of blood donors and recipients.⁹

There are in the United States today about 14,000 generic types of medical devices and diagnostic products applied or implanted by more

³ 21 U.S.C. 355(b) and 355(j) (1).

⁴ 21 U.S.C. 321(p)(1), 321(p)(2), 355(b), 355(e), and 355(l). Pub. L. 87-781.

⁵ "Food and Drug Administration FY 77 Forward Plan," April 1975, Department of Health, Education, and Welfare, Public Health Service, p. 21.

⁶ "Regulatory Reform—Volume II, Federal Power Commission, Food and Drug Administration." Hearings Before the Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 94th Cong., 2d Sess., March 15 and 19, 1976, p. 630.

⁷ 21 U.S.C. 352, 355.

⁸ See p. 5, *supra* at p. 20.

⁹ *Id.* at p. 39.

than 4,000,000 health personnel for millions of consumers for diagnostic and therapeutic purposes.¹⁰ Recent legislation (Pub. L. 94-295: Medical Device Amendments of 1976) gives FDA authority to set standards for premarket evaluation of such products, to establish guidelines for use, and to oversee various other aspects of their distribution to insure that they are used safely and are accomplishing their intended tasks.

FDA is responsible for regulating the interstate marketing of animal drugs, devices and feeds, to insure that they are safe for consumers of food from animals; safe and effective for animals; and safe for the environment. The Agency regulates about 650 animal drug manufacturers and more than 13,000 medicated feed-mixing mills.¹¹ Of an animal population exceeding 3.5 billion in the U.S., about three-quarters receive drugs in feed. FDA is responsible for insuring that drug residues in feed are safe, as determined by scientific techniques capable of detecting chemicals at a minute level. The need for careful monitoring in this task is described at length below in the nitrofurans case.

Assurance that more than 280 billion pounds of food consumed in the United States each year is safe, pure, and wholesome requires oversight of more than 30,000 domestic production and processing plants, in addition to more than 40,000 additional packaging, labeling, and storage facilities. The Agency must constantly monitor toxicologic literature to determine if food additives in widespread use are harmful.¹²

Under the Federal Food, Drug, and Cosmetic Act, FDA is also charged with preventing food contamination,¹³ a source of numerous deaths and illnesses. In 1970, 118 deaths reported to the Agency were attributed to contaminated food; in 1971, 112; in 1972, 112; and in 1973, 115.¹⁴ FDA has been blamed for the fact that many food processing establishments still fail to adhere to basic standards of cleanliness. On the basis of its inspections from 1969 through 1972 FDA conceded that sanitary conditions in the food industry have been deteriorating.

In 97 food processing and manufacturing plants, the General Accounting Office (GAO) found that:

... 39, or about 40 percent, were operating under insanitary conditions. Of these, 23, or about 24 percent, were operating under serious insanitary conditions having potential for causing or having already caused, product contamination.¹⁵

FDA officials advised GAO that the conditions of the plants examined would, in their opinion, be a representative sample of plants nationwide. Therefore, GAO concluded that:

... 1,800, or about 40 percent, of the 4,550 plants¹⁶ were operating under insanitary conditions, including 1,000, or about 24 percent, operating under serious insanitary conditions.¹⁷

¹⁰ *Id.* at p. 25.

¹¹ *Id.* at p. 43.

¹² 21 U.S.C. 342(c).

¹³ 21 U.S.C. 342(a).

¹⁴ Letter to the Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, from Robert C. Wetherell, Jr., Director of Legislative Services, Food and Drug Administration August 24, 1976.

¹⁵ "Dimensions Of Insanitary Conditions In The Food Manufacturing Industry," Report of the Comptroller General of the United States, B-164631(2), April 18, 1972, p. 2.

¹⁶ The 97 plants inspected were taken from a sample of 4,550 plants in six FDA jurisdictions.

¹⁷ See n. 15, *supra*.

Under the Fair Packaging and Labeling Act,¹⁸ the Agency is charged with assuring that foods meet established regulations concerning composition, packaging and labeling. Certain manufactured foods also must conform to FDA standards, to protect consumers.¹⁹

FDA must also assure that cosmetic products are safe and are labeled correctly. Under limited authorities of the Federal Food, Drug, and Cosmetic Act, the Agency maintains registries of establishments, formulations, and adverse reactions. Cosmetic products in 1975 accounted for about \$6 billion in domestic sales.²⁰

Provisions in the Public Health Service Act²¹ direct FDA to determine that the U.S. population is not exposed to unnecessarily hazardous radiation. The prevalent use of X-rays in diagnostic procedures and hazardous doses of radiation from such sources as televisions, microwave ovens, and other devices, present a potential for injury that the Agency is required to monitor.²² In exercising responsibility, FDA issues performance standards for electronic products and devices.

A division of FDA, the National Center for Toxicological Research, (NCTR) in conjunction with the Environmental Protection Agency, conducts research on the broad biological effects of potentially toxic substances. Since its establishment in 1971, this division has helped the Agency to base its regulatory decisions upon scientific evidence. Since manufacturers often are reluctant or unable to perform satisfactory tests of their products, it has become necessary for the Government to perform the tests for consumer protection.²³

In summary, FDA has the duty to insure that consumers are protected from potentially deleterious effects of unsafe foods, drugs, and cosmetics. As a regulatory Agency, FDA must oversee manufacturing practices so as to insure that products are safe and effective. This duty necessitates good science and sound direction.

III. Implementation of Mandate

Congress has provided FDA with relatively specific regulatory standards to insure that its mandate is effectively executed. Any person may file an application with the Secretary of Health, Education, and Welfare to distribute a drug in interstate commerce. Congress intended that these applications by distributors should serve to protect the public from harmful substances.

For new drugs, the public is protected mainly by the requirements for an application, set out in the Federal Food, Drug, and Cosmetic Act. The Act requires premarket clearance of all drugs used by human and animal consumers. Every drug application must include:

(1) full reports of investigations which have been made to show whether or not such drug is safe and effective for use; (2) a full list of the articles used as components of such drug; (3) a full statement of the composition of such drug; . . .²⁴

¹⁸ 15 U.S.C. 343(a)-(k).

¹⁹ 21 U.S.C. 1451 *et seq.*

²⁰ See n. 5, *supra* at p. 57.

²¹ Public Health Service Act, Section 356(a)(2), 42 U.S.C. 263d(a)(2).

²² Public Health Service Act, Section 356(a)(5), 42 U.S.C. 263d(a)(5).

²³ Because of the complexity of scientific regulatory decisions, the National Center for Toxicological Research has placed major emphasis on the development of improved methodologies and test protocols for evaluation of the safety of chemical toxicants.

²⁴ 21 U.S.C. 355(b) for human drugs; 21 U.S.C. 360b(b) for animal drugs.

This protection has been elaborated by the two steps in the approval process. The first step requires applications for Investigational New Drugs (IND's) for human use and Investigational New Animal Drugs (INAD's) for animal use. A drug in the IND or INAD stage may be distributed solely for experimental purposes, to determine safety and effectiveness.²⁵

The second reviews New Drug Applications (NDA's) or New Animal Drug Applications (NADA's) for general distribution. These applications must be approved before the drug is marketed to the public. Even with approval, the drug may be marketed only under prescribed conditions.²⁶

Section 512(b) of the Act shows the intent of Congress that the Agency conduct a full scientific evaluation of the safety and effectiveness of the product. This section requires:

(4) a full description of the methods used in, and the facilities and controls used for, the manufacture processing, and packing of such drug; (5) such samples of such drug and of the articles used as components thereof, of any animal feed for use in or on which such drug is intended, and of the edible portions of products (before or after slaughter) of animals to which such drug (directly or in or on animal feed) is intended to be administered, as the Secretary may require; (6) specimens of the labeling appropriate for such use, and specimens of the labeling for the drug to be manufactured, packed, or distributed by the applicant; . . .²⁷

Congress also intended that the burden of proof of safety and efficacy should be on the manufacturer. The section requires:

. . . Such person shall submit to the Secretary . . .

(7) a description of practicable methods for determining the quantity, if any, of such drug in or on food, and any substance formed in or on food, because of its use; and (8) the proposed tolerance or withdrawal period or other use restrictions for such drug if any tolerance or withdrawal period or other use restrictions are required in order to assure that the proposed use of such drug will be safe.²⁸ (Emphasis added.)

Several methods may be used by FDA to enforce its statutory authority. One is seizure. Under section 304 of the Federal Food, Drug, and Cosmetic Act, the Agency may seek a court order authorizing the seizure of any food, drug, device or cosmetic that is "adulterated or misbranded" when introduced into interstate commerce.²⁹

Recall is an alternative to seizure, but has a strong voluntary component. FDA's chief function, once a recall is initiated by a manufacturer, is to monitor the performance. This procedure has been developed by the Agency via internal policy guidelines. No statutory provisions or formal regulations provide for recall.³⁰

Withdrawal may be used to remove from the market products formerly approved. The law requires notice and opportunity for hearing prior to issuance of a withdrawal order.³¹ In the past 5 years, the Secretary has withdrawn approval for approximately 1200 animal drugs. Most of these have been withdrawn voluntarily by the man-

²⁵ "A Discursive Dictionary of Health Care," Staff of the Subcommittee on Health and the Environment, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 94th Cong., 2d Sess., February 1976, p. 86.

²⁶ *Id.*, p. 109.

²⁷ 21 U.S.C. 360b(b), Subsections (4), (5), and (6).

²⁸ 21 U.S.C. 360b(b), Subsections (7) and (8).

²⁹ 21 U.S.C. 334.

³⁰ "Regulatory Procedures Manual," Executive Director of Regional Operations, Food and Drug Administration, September 21, 1973 Revision.

³¹ 21 U.S.C. 355(e) and 360b(e).

manufacturer before official notice.³² FDA regulations also provide for a summary withdrawal, without a hearing, if no substantial factual issues are raised by the manufacturers or distributors.³³

The Secretary of Health, Education, and Welfare may suspend the sale of a product immediately if it constitutes an "imminent hazard" to human health.³⁴ As this procedure has never been used by the Agency, it is uncertain what the Secretary may require as sufficient evidence. FDA's definition of an imminent hazard appears in a regulation quoted later.³⁵

The Federal Food, Drug, and Cosmetic Act also provides for enjoining violators of the statute. The Act stipulates that violators of an injunction or agency order shall be imprisoned for not more than 1 year or fined not more than \$1,000 or both.³⁶ The Agency recommends to the Department of Justice cases of "adulterated or misbranded" products for prosecution. In 1974, there were 106 such prosecutions and 417 seizures; in 1975, 82 prosecutions, 435 seizures, and 42 citations; and in the first three quarters of 1976, 63 prosecutions, 216 seizures, and 29 citations.³⁷

For drugs that pose difficult questions, the Agency may establish an outside independent scientific advisory committee to review evidence and suggest specific conditions of approval for the drug. The advisory committee also may advise the director that additional scientific evidence is needed for a proper decision. Currently, the Agency has 69 advisory committees; 34 for drugs.³⁸ The Surgical Drugs Advisory Committee's relations with the Agency with respect to Chymopapain are discussed later in a section of this report.

Through its Bureau of Biologics the Agency issues licenses for manufacturers and specific products, a process that may include inspection of facilities to assure compliance with established regulations. In fiscal year 1975, FDA issued 232 licenses for products such as vaccines and blood and 161 licenses to establishments producing them. The Bureau also conducts its own research to set new product standards and develop new testing measures.³⁹

The Bureau of Medical Devices and Diagnostic Products oversees the Agency's responsibilities in the medical device and diagnostic products area. Recent legislation has greatly augmented the Bureau's role in the establishment of uniform standards for these instruments, since the Agency has previously lacked specific responsibilities in this area.⁴⁰

With regard to animal drugs, devices, and feeds, the Agency's Bureau of Veterinary Medicine uses many of the same methods employed by the Bureau of Drugs. In conjunction with the Bureau of Foods (see below), the Bureau of Veterinary Medicine must determine the safety of any drug-related residues found in meat, milk, or eggs. In addition, the Bureau must set limits, or tolerances, on the concentra-

³² See n. 14, *supra*.

³³ 21 C.F.R. 314.200.

³⁴ 21 U.S.C. 355(e) and 360b(e).

³⁵ 21 C.F.R. 3.73.

³⁶ 21 U.S.C. 333.

³⁷ See n. 14, *supra*.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ "Medical Device Amendments of 1976," Public Law 94-295, May 28, 1976.

tion of drug residues allowable before it approves a New Animal Drug Application. The Bureau of Veterinary Medicine, as charged by the Delaney Clause⁴¹ of the Federal Food, Drug, and Cosmetic Act, must also determine that no chemical residues in food persist in concentrations that present a serious risk of cancer.

FDA's Bureau of Foods conducts inspections of food establishments and examines food samples in checking for violations which warrant action to remove hazardous foods from the market. In 1975, the Bureau completed 19,435 inspections of food establishments.⁴² In addition, the Bureau reviews industry petitions for the safe use of food additives and maintains constant surveillance of potentially hazardous conditions. In 1975, the Bureau received 177 applications for food additives.⁴³

The Bureau of Radiological Health develops and issues performance standards for electronic products and devices to limit the radiation they emit during operation. The Bureau also develops methods for radiation detection and conducts user education programs to promote safe practices for X-ray laboratories. The Bureau has published standards for this purpose for microwave ovens, television receivers, cathode ray tubes, ionizing radiation employed by physicians, and lasers.⁴⁴

IV. Case Studies

In the course of the Subcommittee's study of regulatory agencies, a questionnaire was sent to FDA in June of 1975. In response, FDA submitted answers that filled approximately 15,000 pages. We have sent several more requests for elaboration and clarification of these answers. The Subcommittee in total has sent more more than 100 specific written requests to FDA eliciting several hundred pages of response. Interviews, briefings, and meetings held with program and policy personnel have included informal hearings on specific topics such as the drugs silicone and chymopapain, conflict of interest, and a pre-hearing briefing with several senior officials including the Commissioner.

Following this extensive preliminary examination, 2 days of hearings were held on March 15 and 19, 1976, with subsequent questions to Secretary of Health, Education, and Welfare, F. David Mathews at an April 8, 1976 hearing.

These hearings focused upon studies that were intended to evaluate the manner in which FDA carries out its assigned responsibilities.

A. NITROFURANS⁴⁵

The Subcommittee elected to examine nitrofurans, a particular class of animal drugs, in order to review in detail the process FDA uses in protecting the public from a potential carcinogen on the market. Since 1938, 25,076 animal drugs have been approved.⁴⁶ Since 1906, 1,246 animal drugs have been withdrawn.⁴⁷ The nitrofuran compounds are anti-

⁴¹ 21 U.S.C. 360b(d) (1) (II).

⁴² See n. 14, *supra*.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See n. 6, *supra*.

⁴⁶ Information received in telephone conversation with Robert C. Wetherell, Jr., Director of Legislative Services, Food and Drug Administration, August 25, 1976.

⁴⁷ See n. 14, *supra*.

bacterial agents used in animal feed at low levels of concentration. Dairies also use them to treat mastitis.

The nitrofurantoin case also illustrates the operation and interaction of FDA's administrative, enforcement, and scientific responsibilities. In studying the nitrofurantoin case, the Subcommittee posed the following sets of questions:

As to FDA's data collection and managerial system: Does the Agency administer its mandate effectively and thoroughly? Is appropriate testing required, especially for residues? When new evidence becomes available, does FDA meet its responsibilities?

As to FDA's scientific capabilities: Does the Agency review available scientific data adequately? Is this review conducted in a timely fashion, and does it reach sound and defensible conclusions? Does FDA require appropriate burden of proof of safety by the manufacturers?

As to FDA's powers to suspend the sale of drugs that present an imminent hazard: Does the Agency possess authority to move quickly and effectively to remove hazardous products from the market?

As noted above, the Food and Drug Administration, under the Federal Food, Drug, and Cosmetic Act,⁴⁸ must insure that drugs it approves for public use are both efficacious and safe. To this end, it reviews and acts upon applications manufacturers must submit for approval and permission to market new drugs. Reports and data compiled by the manufacturers form the basis for the Agency's decision.⁴⁹

Through its Bureau of Foods and Bureau of Veterinary Medicine, the Agency must determine that drugs proposed for use in animals producing food do not persist in such foods as residues dangerous to human health.⁵⁰

The Agency also prescribes conditions for use of the animal drugs.⁵¹ The Agency must determine also that animal drugs used, if ingested, do not induce cancer in humans or animals, unless it is evident that no residues above the acceptable level are found in food.⁵² This provision, the Delaney clause, has aroused interest because methods or evidence developed subsequent to approval of a new drug may reveal formerly unsuspected carcinogenic hazards in food. A New Animal Drug Application (NADA) may be suspended by the Secretary of Health, Education, and Welfare when he determines that use of the drug poses an "imminent hazard" to the health of man; or the application may be withdrawn after a hearing. In the event a hazard appears, the FDA Commissioner is required to inform the NADA holder and issue a Notice of Opportunity for Hearing, giving the holder 30 days to respond to the findings and, at the same time, issuing an order to withdraw approval of the NADA pending outcome of the hearing.⁵³

⁴⁸ 21 U.S.C. 355(b) (1).

⁴⁹ See n. 6, *supra* at p. 585.

⁵⁰ According to the General Accounting Office report (p. 3), "FDA's Bureau of Veterinary Medicine has primary responsibility for reviewing NADA's which are submitted to demonstrate the safety and effectiveness of new animal drugs. FDA's Bureau of Foods assists the Bureau of Veterinary Medicine by reviewing data submitted to demonstrate the safety of any drug-related residues in food." An accompanying note reads: "The Bureau of Veterinary Medicine was established on Jan. 1, 1966. Before then, the Bureau of Medicine had responsibility for regulating both human and animal drugs. The Bureau of Foods and Drugs were established Feb. 1, 1970. Before then, the functions of the Bureaus of Foods and Drugs were divided among the former Bureaus of Medicine, Science, and Compliance."

⁵¹ 21 C.F.R. 314.1.

⁵² 21 U.S.C. 360b(d) (1) (H).

⁵³ 21 U.S.C. 360b(e) (1).

Beginning in 1948, the Agency approved New Animal Drug Applications for four nitrofurans (nitrofurazone, nihydrazone, furazolidone, and furaltadone) that have been and are being used extensively. Sales of all nitrofurans used as antibacterials for food-producing animals are estimated at \$4 million per year.⁵⁴ Approximately 400,000 pounds is fed to 1 billion chickens, 300 million turkeys, and 18 million swine.⁵⁵ Beginning in 1965, the Agency's reviews have suggested strongly the tumorigenicity (oncogenicity) and potential carcinogenicity of these drugs.⁵⁶ More recently, evidence compiled by the General Accounting Office (GAO) at our request has developed that nitrofurans residues may remain in consumable food; however, investigators both in the industry and within FDA have been unable consistently to measure the degree of their persistence in food for human use.⁵⁷

The Norwich Pharmacal Company is the sole U.S. manufacturer of the four nitrofurans; Norwich and Hess & Clark, Inc. have FDA approval to market the drugs.⁵⁸ Informed in April 1965 by University of Wisconsin scientists that rats fed nitrofurazone had developed a "substantial number of mammary tumors,"⁵⁹ Norwich initiated its own studies.⁶⁰ Despite this initial indication more than 11 years ago, these drugs are still in use.

The General Accounting Office report submitted to the Subcommittee on March 15, 1976, stated:

In April 1965 FDA was notified of the nitrofurans' possible tumorigenicity. When subsequent studies confirmed their tumorigenicity, FDA, in March and August 1971, issued Notices of Opportunity for Hearing proposing to withdraw approval of the NADAs for nitrofurazone, nihydrazone, furazolidone, and furaltadone for use in food-producing animals. . . .

As of February 1, 1976—about 4 years after FDA proposed withdrawing approval of the nitrofurans NADAs and about 10 years after the question of their possible tumorigenicity was raised—FDA had not published a final order concerning the safety of nitrofurans use in food-producing animals.⁶¹

Subsequent cancer studies performed by Norwich, Hess & Clark, and the FDA reached varied conclusions. A February 1967 study performed by Hess & Clark concluded that "The incidence of tumors * * * did not suggest a drug relationship;" a Bureau of Foods veterinarian who reviewed this data said that nitrofurans, as a class, "had carcinogenic potential."⁶²

On August 30, 1968, FDA notified Norwich that additional testing should be initiated immediately for all marketed nitrofurans derivatives.⁶³ Subsequent to its first study, Norwich has conducted five additional studies that, when reviewed by Bureau of Foods veterinarians from June 18, 1971 through November 12, 1973, generally indicated the nitrofurans group was carcinogenic.⁶⁴ On October 9, 1974, a Bureau

⁵⁴ "Inflation Impact Statement of Proposed Rulemaking: Nitrofurans (5-Nitro) Compounds," Food and Drug Administration, February 23, 1976 Draft, p. 17.

⁵⁵ This information was obtained by Thomas V. Raines, D.V.M., Bureau of Veterinary Medicine, Division of New Animal Drugs, Food and Drug Administration, on January 20, 1976 and February 2 and 3, 1976 from Norwich and Hess & Clark.

⁵⁶ "Use of Cancer-Causing Drugs in Food-Producing Animals May Pose Public Health Hazard: The Case of Nitrofurans," Report of the Comptroller General of the United States, MWD-76-85, February 25, 1976, p. 29.

⁵⁷ *Id.* at pp. 36-45.

⁵⁸ See n. 6, *supra* at p. 322.

⁵⁹ See n. 56, *supra* at 27.

⁶⁰ *Id.* at p. 24.

⁶¹ *Id.* at p. 7. 36 F.R. 5926-5927, March 31, 1971; 36 F.R. 14343, August 4, 1971.

⁶² See n. 56, *supra* at p. 25.

⁶³ *Id.*

⁶⁴ *Id.* at pp. 25-29.

of Foods veterinarian notified the Bureau of Veterinary Medicine of the Norwich findings and stated that furazolidone-treated rats also showed a tendency to develop malignant tumors.⁶⁵

In the face of differing conclusions about the potential carcinogenicity of nitrofurans, FDA submitted the question for review in 1969 to an Interdepartmental Technical Panel on Carcinogens—composed of representatives from the Agency, the National Cancer Institute, and the U.S. Department of Agriculture.⁶⁶ Philippe Shubik, Director of the University of Nebraska's Eppley Institute for Research in Cancer and one of the three members of the committee, on September 10, 1970, wrote to the Director of the Bureau of Veterinary Medicine: "I have no question or doubt from the material presented so far that these compounds are carcinogenic."⁶⁷

The Subcommittee believes that the Agency, at that point (1970), had sufficient notice that the data suggested the strong possibility of a hazard. We believe the agency should have proceeded to identify the specific issues requiring resolutions and should have required resolution by the manufacturers within a specified time. Withdrawal proceedings for the drugs should have been instituted by FDA at that point.

After numerous consultations with Norwich and Hess & Clark, the agency, 11 months later, on August 4, 1971, issued Notices of Opportunity for Hearing proposing to withdraw NADAs for furazolidone and furaltadone.⁶⁸ These Notices, however, have never been acted upon, according to the Agency's Associate Chief Counsel for Veterinary Medicine, because they were too vague, thus allowing Norwich and Hess & Clark an inordinate amount of leeway in what issues could be reviewed at the proposed hearings.⁶⁹ After determining that the Notice was too vague in 1973, the Agency should have taken steps promptly to insure that an expedited hearing could be held under explicit notices. In fact, FDA took no action until advised of the Subcommittee's investigation in March 1976.

Richard Merrill, the FDA's General Counsel said the Agency was "getting reversed (in court) because the notices (on other proposed withdrawals) that we were issuing at that time (1973) were not adequate . . . I think we would have lost the hearing and lost the appeals review," in a case involving furazolidone and furaltadone.⁷⁰ In response to questions regarding the time required to issue the original hearing notice, Merrill said:

While it took too long, there is no doubt that when we go to a hearing we want to win that hearing, we don't want to be told that the hearing notice was inadequate or that the hearing basis is inadequate.⁷¹

Two years after the hearing notice on October 15, 1973, the Bureau of Foods concluded, after additional reviews of the available data, that furaltadone was carcinogenic and that furazolidone was "highly

⁶⁵ *Id.* at p. 29.

⁶⁶ *Id.* at p. 9.

⁶⁷ Letter to Dr. C. D. Van Houweling, Director, Bureau of Veterinary Medicine, Food and Drug Administration, from Dr. Philippe Shubik, Director, Eppley Institute for Research in Cancer, September 10, 1970.

⁶⁸ See n. 56, *supra* at p. 13. These hearings have not yet been held.

⁶⁹ *Id.* at p. 20.

⁷⁰ See n. 6, *supra* at p. 528.

⁷¹ *Id.*

suspect.”⁷² Despite this determination, based in part on the presence of furaltadone residues in milk, no recommendation went to the FDA Commissioner for a decision to suspend its use at once.⁷³

The history of the case to this point (late 1973) clearly indicates a failure by the Agency to act promptly within its designated powers to determine if the evidence did warrant prompt reconsideration of the drugs. The Bureau of Foods, based on available evidence, should have recommended withdrawal or suspension; it did not. The Commissioner should have recommended withdrawal or suspension at this time; he did not.

The Agency continued to accept scientific re-evaluations from the companies through March 14, 1976, the night before the Subcommittee's initial hearing on nitrofurans, when the Agency (working unusual Sunday hours) announced plans for another Notice of Opportunity for Hearing on the drugs. The coincidental appearance of the Agency's new intentions and the Subcommittee's investigation of the delay in deciding the nitrofurans issue was described by Subcommittee Member Henry Waxman as a “press show.” Commissioner Schmidt denied the Agency was simply reacting to the Subcommittee's investigation.⁷⁴ The FDA press release announcing the plans, dated March 14, 1976, indicated that the Agency, in the event of presentation of reasons for a hearing, would hold it “as quickly as possible.”

As noted earlier, the Secretary of Health, Education, and Welfare is empowered to suspend immediately the use of an approved food, drug, or cosmetic before a hearing if its continued use poses an “imminent hazard” to human health. FDA has defined “imminent hazard” by regulation as—

... a public health situation (1) that should be corrected immediately to prevent injury and (2) that should not be permitted to continue while a hearing or other formal proceeding is being held.⁷⁵

In the nitrofurans case, the Agency has not invoked the power to suspend.

In addition to the regulations for imminent hazard, Dr. Schmidt, during the Subcommittee hearings, provided two additional perspectives on its use.

One of the reasons that we have not invoked imminent hazard in some areas is that we have not had to, because if there is indeed an imminent hazard, then pharmaceutical houses in particular, because of the threat of lawsuits and bad publicity and so on, are quick to withdraw their own products. So that in times past, drugs such as sequential oral contraceptives, pertussin, and a number of drugs, in which we might have had occasion. The industry very quickly pulled the product off the market themselves.⁷⁶

In the case of nitrofurans, however, the manufacturer did not withdraw the products. Further, this situation was materially different from the type alluded to by Dr. Schmidt: here, the Agency was faced with a drug fed to animals, not humans, a drug whose deleterious effects would probably be detected only by FDA study or by those who benefit from the drug's sale. The criteria for withdrawal or sus-

⁷² See n. 56, *supra* at p. 16.

⁷³ See n. 6, *supra* at p. 524.

⁷⁴ *Id.* at p. 529.

⁷⁵ 21 C.F.R. 3.73a.

⁷⁶ See n. 6, *supra* at pp. 574-575.

pension of a product should not be based upon the potential threat of lawsuits, bad publicity, and voluntary actions by the manufacturer, but rather upon the need for protection of the public health to prevent possible injury while a serious issue is resolved.

Dr. Schmidt further stated:

... our interpretation of the entire legislative [history] was that the Congress appreciated that this provision of the law would be used only rarely, and in extraordinary circumstances. Clearly, we have not used it often. It is my belief that something that would present an imminent hazard, which would not be removed from use quickly by some means, and which we would have to invoke the imminent hazard standard, would be unusual indeed.⁷⁷

Although neither the statute nor FDA regulations dictate that the imminent hazard rule be used only rarely and in extraordinary circumstances, FDA according to Dr. Schmidt has *never* suspended use of *any* animal or human drug because it was considered an imminent hazard.⁷⁸

Use of the imminent hazard provision depends upon two factors: the degree of the risk and the length of time necessary to resolve the questions of safety during the administrative process. *Environmental Defense Fund, Inc. v. Environmental Protection Agency (EDF v. EPA)* focused upon both issues. In its decision, the U.S. Court of Appeals said:

We have cautioned that the term "imminent hazard" is not limited to a concept of crisis: It is enough if there is *substantial likelihood* that serious harm will be experienced during the year or two required in any realistic projection of the administrative process.⁷⁹

Dr. M. Adrian Gross, former FDA Assistant Director for Scientific Coordination and currently serving as a scientist in the Agency's Bureau of Drugs, was an expert scientific witness in this EPA case. In an effort to clarify the grounds for possible invocation of the imminent hazard clause in the nitrofurans case, the Subcommittee reviewed prior testimony given by Dr. Gross. Dr. Gross testified regarding an environmental group's contention that the Environmental Protection Agency should have suspended the use of two pesticides suspected of being carcinogenic. While Dr. Gross said that everyone faces a possible hazard of developing cancer in the course of daily life, he added that persons exposed to certain aberrational conditions—

... radiation, workers in certain industries associated with the production of beta-naphthyl amines, asbestos, vinyl chloride, etc., heavy smokers, patients exposed to carcinogenic drugs, consumers of carcinogens in food such as aflatoxin, etc. ...

confront hazards that are "imminent."⁸⁰ A question of key importance for the Subcommittee involved Dr. Gross' view of the time factor as it relates to the definition of "imminent":

There is no question, for example, that eating a can of mushrooms contaminated with botulinus toxin constitutes an "imminent hazard," since one can immediately conjure the spectre of people keeling over and dying soon after such exposure. The question is here, it seems to me, since cancer has a very long

⁷⁷ *Id.* at p. 590.

⁷⁸ *Id.* at p. 574.

⁷⁹ *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 510 F.2d 1292, 1297 (1975). The case involved the "imminent hazard" suspension authority contained in the Federal Pesticide Control Act (7 U.S.C. 136d), similar to that in the Federal Food, Drug and Cosmetic Act.

⁸⁰ Testimony given by Dr. M. Adrian Gross at court hearing, *Environmental Defense Fund, Inc. v. Environmental Protection Agency* 510 F. 2d 1292 (1975).

latency (perhaps as long as 20 to 30 years), *is this sufficient to think of this event as being less "imminent"? I do not think so.*⁸¹ (Emphasis added)

Although Dr. Schmidt expressed general agreement with this statement,⁸² he went on to indicate that the definition of "imminent hazard" as he understood it and as interpreted by other regulatory agencies includes "an unreasonable and imminent risk to the public." The nitrofurans, according to Dr. Schmidt, do not pose such a risk.⁸³

Dr. SCHMIDT. Yes; in other words, there is a hazard associated with smoking cigarettes. I would not define the hazard as being imminent.

Mr. MAGUIRE. Even though someone might die 20 years hence?

Dr. SCHMIDT. Twenty years is not within my definition.

Mr. MAGUIRE. So imminent is a time factor?

Dr. SCHMIDT. Yes.

Mr. MAGUIRE. Delay is the measurement of time between when something is ingested, let's say, and when the person is likely to feel or suffer any effects, is that correct?

Dr. SCHMIDT. That is my interpretation.

Mr. MAGUIRE. I would think imminent might better be defined as that time period in which you exposed yourself to something and suffered some sort of irremedial harm either that day or 20 years later. Why won't that be a better definition of imminent? In other words, if you have a carcinogen on the market which I would have ingested tomorrow except for your act today which prevented me from ingesting it, thus saving me from dying 20 years from now, why isn't that classified as imminent and therefore something that you would act on? The fact that I die 20 years later would mean, under your definition, that you need not take any action even though it is deadly.⁸⁴

It is clear to the Subcommittee that the time of injury is not critical to the imminence of the hazard; the probability of serious injury is the true concern. The Subcommittee has noted that the administrative process reviewing evidence regarding the possible harm posed by nitrofurans has spanned 11 years, 5 years since the hearing notices. The drugs, despite evidence strongly suggesting their carcinogenesis, are still on the market. FDA has thus shifted the risk of illness to the public while the issue is debated. This position is not consistent with the basis for Section 512(e) (1) of the Federal Food, Drug, and Cosmetic Act.⁸⁵

The statute does not direct that the withdrawal of an imminent hazard be based upon a decision of a pharmaceutical house; it gives the Commissioner of the Agency and the Secretary of the Department responsibility to carry out the statutory mandate as established by Section 360b(e) (1) (B).

The Department shall withdraw approval when:

(B) . . . new evidence not contained in such application or not available to the Secretary until after such application was approved, or tests by new methods, or tests by methods not deemed reasonably applicable when such application was approved, evaluated together with the evidence available to the Secretary when the application was approved, shows that such drug is not shown to be safe for use under the conditions of use upon the basis of which the application was approved for that subparagraph (H) of paragraph (1) of subsection (d) applies to such drug;⁸⁶

GAO concluded that the Agency's interpretation of the imminent hazard provision—and not the definition itself—needs to be liberalized

⁸¹ *Id.*

⁸² See n. 6, *supra* at p. 596.

⁸³ *Id.* at p. 597.

⁸⁴ *Id.* at p. 551.

⁸⁵ 21 U.S.C. 360b(e) (1).

⁸⁶ 21 U.S.C. 360b(e) (1) (B).

along the lines of the decision in *EDF v. EPA*.⁸⁷ Supporting this position, the Agency regulations state:

The "imminent hazard" may be declared at any point in the chain of events which may ultimately result in harm to the public health. The occurrence of the final anticipated injury is not essential to establish that an "imminent hazard" of such occurrence exists.⁸⁸

The Subcommittee is of the opinion that the statute and regulations focus solely upon the need to correct a serious public health hazard; consequently, the time of resultant death or injury is not critical. The Commissioner has too narrowly construed the definition of a imminent hazard.

Further, the Delaney Clause of the Food, Drug, and Cosmetic Act prohibits FDA from allowing the use of animal drugs that induce cancer to be used for food-producing animals, unless no residues above acceptable tolerance levels are found in the food they produce.⁸⁹ The burden of demonstrating the absence of hazardous residues rests with the manufacturer.⁹⁰ The manufacturer of nitrofurans has not yet demonstrated that foods contain no such hazardous concentrations.

A factor the Agency should consider in the decision to suspend a New Animal Drug Application is the availability of substitute drugs that do not pose similar dangers.⁹¹ Acceptable substitutes for nitrofurans are available. Amprolium, clopidol, or decoquinatate may be used instead of furazolidone, a known carcinogen; tetracycline and penicillin may be used instead of furaltadone, a highly suspect carcinogen; amprolium and clopidol may be used instead of nihydrazone, a highly suspect carcinogen; various sulphur drugs may be used instead of nitrofurazone, highly suspected of being a carcinogen.⁹²

These available substitutes reinforce the position that the drug be suspended pending determination of safety.

The Subcommittee believes that the administrative delay in the nitrofurans case is unacceptable, considering the nature of the hazard. Chairman Moss stated at the Subcommittee hearing: "FDA does not have the authority or right to gamble with the public health of our citizens."⁹³

FDA General Counsel Merrill testified in this connection:

I don't think there is any excuse for the length of time we have taken.⁹⁴

The Subcommittee agrees with the GAO conclusion that the Agency should adopt a more liberal interpretation of the "imminent hazard" provisions,⁹⁵ because cancer may emerge many years after the growth was triggered by exposure to an oncogenic chemical, radiation, or a combination of stresses. FDA, instead of exercising its suspension prerogative,⁹⁶ chose to afford NADA holders an opportunity to bring all relevant data to light at a hearing. In 1971 the Agency issued a notice

⁸⁷ See n. 56, *supra* at p. 49.

⁸⁸ 21 C.F.R. 3.73(a).

⁸⁹ 21 U.S.C. 360b(d)(1)(H).

⁹⁰ 21 U.S.C. 360b(l)(1) and 21 U.S.C. 360b(m)(5)(A).

⁹¹ See n. 6, *supra* at p. 603.

⁹² Memorandum to Chairman John E. Moss from Staff, the Subcommittee on Oversight and Investigations. Re: "Dollar Alternatives to the Use of Nitrofurans Which Do Not Present Similar or Other Dangers to Man," March 18, 1976.

⁹³ See n. 6, *supra* at p. 319.

⁹⁴ *Id.* at p. 528.

⁹⁵ See n. 56, *supra* at p. 49.

⁹⁶ 21 U.S.C. 360b(e)(1).

for a hearing. But, 5 years later, the Agency still has held no such hearing.

The Subcommittee finds that FDA has deferred unduly to the interests of the makers and buyers of nitrofurans, while the public continues to ingest these substances, unaware of their presence. It is now 11 years after the first evidence of their possible carcinogenicity surfaced. Assistant General Counsel Merrill has commented: "... the time has come to stop talking and draft a notice."⁹⁷ The Agency's failure to act sooner is indefensible.

B. PACEMAKERS

Although FDA is responsible, as noted earlier, for the regulation of medical devices (including cardiac pacemakers), the law did not provide FDA with authority to require that medical devices be approved as safe and effective before they are offered for sale.⁹⁸ In this respect, FDA was limited to inspections of a manufacturer's facilities, examination of finished products, and surveillance of experience with devices marketed across State lines.

Pacemakers are implanted in the chest by surgeons to stimulate a regular heart beat. In 1972, the General Electric Company (GE) recalled from the market about 574 pacemakers because defects in the model were suspected of contributing to fatal heart failure in several users and to heart problems in many others. Since then, about 23,000 pacemakers have been recalled in the United States by three other manufacturers because of their defects.

Subsequent to the Subcommittee hearings on these recalls, Congress enacted the Medical Device Amendments of 1976⁹⁹ to augment considerably FDA's statutory powers for monitoring these instruments. Nevertheless, FDA actions regarding pacemakers offer significant insights into the effectiveness of the Agency's enforcement program. These actions pose serious questions as to:

FDA's enforcement powers: Are they sufficient? Are they being executed promptly and efficiently? Are there serious gaps in the administration of the Agency with respect to enforcement?

Through its Bureau of Medical Devices and Diagnostic Products (BMDDP), established in 1971, the Agency is empowered¹⁰⁰ to initiate legal action through the Department of Justice when it considers medical devices to be adulterated or misbranded. Suspicion that specific products are in violation of the Federal Food, Drug, and Cosmetic Act may prompt the Agency to seek a court order to authorize it to seize and remove these products from the market.¹⁰¹ The only other means of stopping sales of suspect products is voluntary recall by the manufacturer(s).

Seizures authorized by a civil court action against misbranded or adulterated items are limited to the specific quantity and location of the medical device identified in the complaint.

⁹⁷ See n. 6, *supra* at p. 577.

⁹⁸ Under Sections 505(b) and 512(b) of the Food, Drug, and Cosmetic Act (21 U.S.C. 355(b) and 360b(b)), FDA requires premarket clearance only for drugs and food additives.

⁹⁹ Pub. L. 94-295, Medical Device Amendments of 1976.

¹⁰⁰ 21 U.S.C. 352.

¹⁰¹ 21 U.S.C. 334.

By definition, a recall includes a manufacturer's correction of products on the market as well as the removal of such products from sale. FDA may not compel a recall.

Because recalls are voluntary, medical device manufacturers are not required to notify FDA of such actions. Once FDA learns of a recall, it can inspect the manufacturer's facilities, collect sample products, conduct tests on finished goods, and investigate the effectiveness of the recall.¹⁰² The Establishment Inspection section (5-00-50-G) of the FDA Regulatory Procedure Manual states:

An in-depth inspection should be made to determine the basic cause for each Class I Recall, as well as for each Class II Recall warranting Level 2 effectiveness checks.¹⁰³

On two occasions in 1972—January and April—GE ordered pacemaker recalls after receiving reports that some of its devices had operated at an abnormally high speed, the result of a short-circuit in those built with tin-plated circuit runs during the period June 6 through September 8, 1971. GE blamed the short-circuit on a "dendritic growth of copper between the circuit runs on the paper epoxy circuit board in the pacemaker," associated with moisture on the tin-plate.¹⁰⁴

The Agency requires its staff to collect and examine physical samples of recalled products.

The inspector will explore all possibilities which may have a bearing on the product's deficiency. To pinpoint the basic cause, the inspector should check records, facilities, conditions, manufacturing controls, and laboratory practices for raw materials, finished products and reserve samples.¹⁰⁵

Yet, the General Accounting Office reports that FDA staff did not do so in this instance, although the Agency had learned of this recall through newspaper stories.¹⁰⁶

During an investigation of GE's facilities, an Agency inspector and a technical representative from the Bureau of Devices were denied entrance into GE's testing laboratory because, the company asserted, the research in there was proprietary. Agency officials never brought enforcement action¹⁰⁷ to obtain access to the testing area. The Acting Director of the Bureau of Devices Compliance Division said that little could be learned from an inspection. This view was not shared by the Agency's technical representative.¹⁰⁸

On August 7, 1972, BMDDP's Division of Compliance advised the Minneapolis District Office that a citation could be issued against GE charging:

... that the products are adulterated under section 501(c) (of the FD&C Act) in that their quality falls below that which they purport or are represented to possess; and that the products are misbranded under section 502(f) (2) (of the act) in that the labeling fails to bear adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users and section 502(j) (of the act) in that the device is dangerous to health when used

¹⁰² "Food and Drug Administration's Investigation of Defective Cardiac Pacemakers Recalled by the General Electric Company," Report of the Comptroller General of the United States, MWD-75-71, March 10, 1975, p. 2. And 21 U.S.C. 352.

¹⁰³ See n. 30, *supra* at section 5-00-50-G.

¹⁰⁴ See n. 102, *supra* at p. 6.

¹⁰⁵ See n. 30, *supra* at section 5-00-50-G-2.

¹⁰⁶ See n. 102, *supra* at p. 5.

¹⁰⁷ 21 U.S.C. 353 and 352 and "Regulatory Procedures Manual", Section 5-00-50-C-2.

¹⁰⁸ See n. 102, *supra* at pp. 6-7.

in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof.¹⁰⁹

Further, the GAO investigation revealed that the Agency had failed to contact all the product consignees, even though the Agency's procedures require that these persons be notified by the manufacturer when a recall presents an imminent hazard. The Agency learned later that at least five physician consignees had not been notified.¹¹⁰

Because of an "administrative oversight," the Acting Director of the Bureau's Division of Compliance said that GE's pacemaker recall never appeared in the Agency's recall list. The FDA did not issue a public warning through the news media. These oversights violated the Agency's recall procedures in force at that time.¹¹¹ The Agency responded to the GAO conclusion:

This pacemaker recall illustrates a situation where the Agency believes a general press release may alarm or frighten those not affected by the recall . . . The emotional trauma experienced by many patients when unnecessary publicity is generated should not be understated.¹¹²

The GAO noted also that GE had failed to locate one of the defective pacemakers.¹¹³

According to the GAO,

. . . the lack of FDA inspection guidelines, safety and performance standards and good manufacturing criteria for complex medical devices such as pacemakers limited the effectiveness of the Agency's investigation of the pacemaker recall.¹¹⁴

In response to these criticisms, the Agency in May 1974 awarded a contract to the Association for the Advancement of Medical Instruments for the development of pacemaker standards. A book of guidelines was received by FDA in August of 1975.¹¹⁵ No official actions have been taken by FDA to use those guidelines.¹¹⁶

During the course of FDA's investigation of GE's recall, the Bureau of Devices concluded that prosecution was not warranted. In reaching this conclusion, the Bureau did not consult with the FDA General Counsel. Questioned later by GAO, the General Counsel said, "There may have been a basis for prosecution against GE," but that the case at the time of GAO's investigation was too old to open. Not only did the Agency elect not to prosecute: it also suspended evaluation of GE's corrected pacemaker once the company informed FDA that the defect had been rectified.¹¹⁷

In testimony before the Subcommittee, Dr. Alexander Schmidt, Commissioner of the FDA, said the Agency was in the process of reviewing the procedure for consulting the General Counsel on investigations.¹¹⁸

¹⁰⁹ *Id.* at p. 11.

¹¹⁰ *Id.* at pp. 7-9.

¹¹¹ *Id.* at p. 8.

¹¹² See n. 6, *supra* at p. 620.

¹¹³ See n.102, *supra* at p. 8.

¹¹⁴ *Id.* at p. 21.

¹¹⁵ "Pacemaker Standards: Labeling Requirements, Performance Requirements, and Terminology for Implantable Artificial Cardiac Pacemakers," Association for the Advancement of Medical Instrumentation, Food and Drug Administration Contract No. 223-74-5083, August 1975.

¹¹⁶ FDA has said they will not take any action on pacemaker standards until they have decided how they are affected by the "Medical Device Amendments of 1976". Telephone conversation with Robert C. Wetherell, Jr., Director of Legislative Services, Food and Drug Administration, August 25, 1976.

¹¹⁷ See n. 102, *supra* at p. 13.

¹¹⁸ See n. 6, *supra* at p. 628.

Richard A. Merrill, FDA General Counsel, told the Subcommittee:

It would be desirable to have consultation take place with the attorneys during the developmental stages of cases and that occurs very frequently but in an agency which has 2800 people in the field and 40 lawyers all of whom are in Washington there are going to be situations in which incipient regulatory actions that may or may not come to fruition are not developed in consultation with an attorney.¹¹⁹

Subsequent to GE's 1972 recall, three other firms—Biotronik, Inc., Cordis Corporation, and Vitatron Medical, Inc.—recalled pacemakers because of a variety of defects, also linked with deaths and injuries. In June and October 1973 and December 1974, the Cordis Corporation recalled about 18,000 pacemakers with circuit defects; FDA did not learn about the June 1973 recall until approximately 16 months later. Biotronik, a German corporation, recalled about 1,345 pacemakers in February 1974 when it was discovered that some units accumulated moisture that caused a malfunction; FDA learned of this recall about 7 months later. In June 1974, Vitatron Medical, a Dutch company, recalled about 506 pacemakers with defective batteries; FDA learned of this recall 6 months later. In January 1975, the Agency had accounted for the location of fewer than half of the Vitatron units under the recall notices. GE initiated an additional recall of 2,000 in June 1974 when defects similar to those in units in the first recall began to recur. After meeting with GE officials and studying data on experience with this unit, the Acting Director of the Bureau of Devices advised the company to suggest a shorter period for use of one of its fixed-rate pacemaker models, advice that the company followed.¹²⁰

In response to a GAO request for an accounting of all deaths and injuries associated with the recalls carried out by the four companies, FDA was unable to offer precise figures since, in some cases,

... neither the firm, the physician nor the Agency have been able to confirm, even after a full and complete investigation, whether a death was actually caused by a defective unit. Moreover, the term "injury," as associated with a pacemaker malfunction, is not easily definable.¹²¹

Continuing investigations by the Agency have indicated, however, that at least seven deaths and two injuries have been caused by malfunctioning pacemakers since the first recall by GE in 1972.¹²² Because the Agency inspected only 68 of the recalled pacemakers, it is difficult to tell how many of the 49 who died wearing defective pacemakers actually were killed by the product's failure.¹²³

The Subcommittee finds the pacemaker history illustrates a number of deficiencies that the Agency must rectify. When specific regulations have been provided to guide the Agency's response to a particular situation, its administrators should ensure that they are followed. Otherwise the FDA should use the services of its General Counsel to amend the regulations or authoritatively interpret them.

The Subcommittee believes that the Agency failed effectively to insure removal of defective pacemakers from the market. The Subcommittee has noted that FDA did not completely inspect GE's manu-

¹¹⁹ *Id.*

¹²⁰ See n. 102, *supra* at p. 16.

¹²¹ See n. 6, *supra* at p. 622.

¹²² See n. 102, *supra* at p. iv.

¹²³ *Id.* at p. 25.

facturing facilities to ascertain the causes of the first recall, and subsequently accepted without question the company's assurances that the device had been corrected. In addition, the Agency stood by although GE failed to notify all consignees of the defective devices, the Agency did nothing to see that word reached all affected physicians, as its recall procedures require.

The Agency failed also to review completely the charge that GE had been deficient or to consult its General Counsel to determine if prosecution was warranted. FDA's General Counsel told the Subcommittee: "I believe my office ought to be consulted at the earliest opportunity in matters of this kind."¹²⁴ When a manufacturer is suspected of violating the regulatory statute, the Subcommittee believes that FDA is obligated to use its legal experts to evaluate the facts and commence appropriate enforcement actions.

In view of technical complexity of medical devices such as pacemakers, coupled with the fact that their performance is critical to the survival of the users, the Agency should insist on comprehensive safety and performance standards for their operation. In order to determine that these standards are met, FDA must staff itself with technically competent inspectors and issue regulations for facility inspections so that FDA officials may ascertain first-hand that deficiencies have been rectified beyond doubt. It is clear that after the initial GE recall, FDA had reason to verify the company's word that the pacemakers had been corrected, since 2 years later the same defect forced recall of about 2,000 other units.

The Subcommittee believes that the Agency's recall procedure, without the appropriate statutory support, is an ineffective way to deal with life and death issues. In 1971, the House Committee on Government Operations spoke eloquently to this point.¹²⁵ Subsequent to that report calling for FDA to review the need for additional legislation on recall,¹²⁶ the Agency has neglected to seek strong recall authority. Furthermore, in the event the Agency has decided that amending the Food, Drug, and Cosmetic Act is unnecessary, the Agency should have issued regulations which would have the force and effect of law on its actions following a recall.

To date, the only legislative request the Agency has made with respect to recall is for increased administrative detention authority.¹²⁷ The Food, Drug, and Cosmetic Amendments, introduced by Agency request in the Senate in 1974 and the House in 1976, included a provision that, upon proper notification of a manufacturer, the Agency would be able to detain a product until a decision could be made on a court order for seizure.¹²⁸ The Subcommittee believes that new recall legislation is essential to FDA's mandate, comparable to the recall authority granted for auto and consumer product safety.

¹²⁴ See n. 6, *supra* at p. 628.

¹²⁵ "Recall Procedures of the Food and Drug Administration." Committee on Government Operations, U.S. House of Representatives H. Rep. 92-585, 92d Cong., 1st Sess., October 21, 1971.

¹²⁶ *Id.* at p. 20.

¹²⁷ FDA has asked for "administrative detention" authority twice (the Food, Drug, and Cosmetic Amendments). S. 3012 was introduced at the request of the Agency, 93d Cong., 2d Sess., February 18, 1974. H.R. 14256 was introduced at the request of the Agency, 94th Cong., 2d Sess., June 18, 1976.

¹²⁸ *Id.*

C. CHYMOPAPAIN

So that FDA may evaluate scientific evidence to determine that drugs are safe and efficacious before they are approved for marketing,¹²⁹ Section 505(b) of the Food, Drug, and Cosmetic Act requires that manufacturers submit:

(1) full reports of investigations which have been made to show whether or not such drug is safe for use and whether such drug is effective in use. . . .

To assess FDA's methods for ascertaining the scientific basis for determining the safety and efficacy of drugs, the Subcommittee reviewed the history of the use of chymopapain, an enzyme administered by injection as a chemical alternative to back surgery. In addition, the Subcommittee examined the chymopapain case to appraise the Agency's use of advisory committees concerning New Drug Applications (NDA's).

Chymopapain, first approved by FDA in 1963 as an Investigational New Drug (IND)¹³⁰ and used in approximately 15,000 patients, was said by its manufacturer, Travenol Laboratories of Morton Grove, Illinois, to dissolve a ruptured or damaged intravertebral disc,¹³¹ a source of acute sciatic pains. In 1967, reports indicated that the drug was potentially dangerous. Some patients had allergic reactions to the drug. Others became paraplegic. At least two patients died in 1973-1974 in Washington as a direct result of an anaphylactic shock.¹³²

Following submission by the manufacturer of a New Drug Application for approval of full marketing privileges, the Agency in February 1971 established the Ad Hoc Committee on Disease. This committee met on January 19, 1972, to review scientific data relating to Chymopapain.¹³³

The ad hoc committee suggested that additional review was needed before NDA approval could be recommended. On February 12, 1973, FDA submitted the question to the Surgical Drugs Advisory Committee, composed of neurosurgeons, orthopedic surgeons, FDA officials, Travenol representatives, and other experts.¹³⁴ This panel received reports from specialists who had used chymopapain. Several committee members, including Dr. William W. Krippaehne, Chairman of the Department of Surgery, University of Oregon, questioned the drug's safety:

DR. KRIPPAEHNE. First of all, it is not a nonhazardous procedure. If any of it leaks out epidurally, you have a major problem, from paraplegia up and down, plus a 1 per cent major type of anaphylactic type of response that you (Dr. Crout) presented in your data. Those are two major things making up 1½ per cent approximately, a very major complication.

And unless you can show efficacy above and beyond alternative treatment or alternative therapy, I think you are in very great danger of getting into trouble

¹²⁹ 21 U.S.C. 355(b).

¹³⁰ "Subcommittee Report on Disease, Chymopapain," Subcommittee of the Surgical Drugs Advisory Committee, Food and Drug Administration, June 27, 1973.

¹³¹ The commercial name for Chymopapain was "Disease."

¹³² Subcommittee Briefing on Chymopapain by Dr. Bernard Sussman, Neurosurgeon at Howard University School of Medicine, May 20, 1975 (to be found in Subcommittee files under "Chymopapain, FDA-107").

¹³³ Ad Hoc Committee on Disease, Dr. Guy L. Odom, Chairman, Bureau of Drugs, Food and Drug Administration, Department of Health, Education, and Welfare, Jan. 19, 1972.

¹³⁴ Transcript of Surgical Drugs Advisory Committee Meeting, Department of Health, Education, and Welfare, Public Health Service, Food and Drug Administration, Rockville, Maryland, February 12, 1973.

when you present material with these two what I look at as very major problems.¹³⁶

At the February, 1973 meeting of the Surgical Drugs Advisory Committee, Dr. Richard Crout, Director of the Bureau of Drugs, told the group that there was still no new data suggesting the safety and efficacy of the drug.

Dr. CROUT. There are really two—well, there are several issues. Let's divide it into three possible kinds of efficacy, and *we are not sure about any one of them.* (Emphasis added.)

One kind of efficacy is: Does this reduce the degree of pain and shorten the period of bed rest: That is a form of efficacy that may very well be valuable.

A precise answer to that question isn't known. That is the sort of thing which might emerge from a controlled clinical trial, because that kind of efficacy is appraised on the basis of two or three months after you have had the injection.

The second kind of efficacy is: Does it reduce the fraction of patients who ultimately get operated upon? Now, that is really unknown. The company thinks so, but that is an unknown figure.

And then the third question of efficacy, I think, is truly unanswerable, and and that is: What does it do over a lifetime to treat the disease: And, as has been pointed out, there is a great deal of controversy on that.¹³⁷

Dr. Francis Jackson, Director of Surgical Services for the Veterans' Administration, questioned the drug's efficacy:

Dr. JACKSON. In the VA (Veterans' Administration) a year ago there was something published on disc repair from World War II, long-term results, which said essentially that for those who have been followed, treated surgically or not, essentially there was no major difference between the two groups. But this was an uncontrolled study.

This is such a controversial area, pain being what it is, a very subjective mechanism, that I for one, realizing that statistically today it is possible to arrive at data in well controlled studies with a small or modest group of patients, personally feel that your alternative or option number one (a controlled study) is the one I would support.¹³⁷

Dr. Crout also reminded the group that, in view of the absence of sufficient data, they would have to be careful in the selection of a new panel to review chymopapain. In this context, Dr. Crout stated:

Some patients require, for example, general anesthesia. Some are done under local, but some are done under general anesthesia. *And actually we should make a decision on this drug based upon the evidence at hand, which means the uncontrolled experiments and the testimony of experts.*

*If we go that route, we have to find the right group of experts to testify about this, because the last panel of experts we had said no, and the data now aren't any different from what they were a year ago. * * **¹³⁸ (emphasis added)

When asked about the problems with the data and the investigators, Dr. Crout replied:

We are not presenting this to you as an ideal example of either drug development or drug regulation. It is an embarrassment to both the FDA and the firm.¹³⁹

Further, the wide variation in scientific data prompted Dr. Crout to observe,

I think we can guarantee you can get any answer you want on any question, depending on whom you call.

And one of the judgments we need you the most for, and that we are having the greatest difficulty with, is whom to ask about what.

¹³⁵ *Id.* at p. 155.

¹³⁶ *Id.* at pp. 153-154.

¹³⁷ *Id.* at p. 150.

¹³⁸ *Id.* at p. 144.

¹³⁹ *Id.* at p. 160.

Dr. GERWIG. This is a problem with you?

Dr. CROUT. Oh, yes, you can get almost any answer you want depending on whom you call about this drug.¹⁴⁰

He then directed a new subcommittee, under the direction of Dr. Robert Hickey, Medical Director of M.D. Anderson Hospital and Tumor Institute in Houston, Texas¹⁴¹ to examine further the conflicting evidence on chymopapain. Apparently, the absence of evidence from a controlled study had obliged the committee to refuse to submit a definitive recommendation on the Chymopapain NDA.¹⁴² The new advisory subcommittee's task was to select a new group of experts to deal with Chymopapain. Apparently undeterred by lack of a controlled clinical trial, Dr. Crout nevertheless seems to have expected the new group of experts to come to a conclusion. Dr. Crout stated:

Well, I would be very grateful and we would appreciate it. I don't think you can come to grips with it without looking at the data for a day.

But as I point out, we have on record now a prestigious group who said no, and we know whoever we pick to another group we can get to say either yes or no, and we know we don't have controlled data, and what is the right way to go? That is your charge and your challenge.¹⁴³

The Subcommittee questions the need for a second group of experts when the preceding one—in Dr. Crout's words a prestigious group—had recommended nonapproval.

At an October 24, 1973 meeting of the advisory committee, the transcript showed the group to be no nearer a decision. The absence of comparable data remained a major obstacle. Dr. Jackson, Director of Surgical Services for the Veterans' Administration, stated:

I am very disturbed about this protocol. I do not see it as being a good scientific clinical document. We were talking about this before you (Dr. Crout) came in. *I do not see this having been designed by clinical investigators. This has been designed by a constituent, if you will.* It lacks definition. It lacks preciseness, where I think that some preciseness could be provided. I think that the generalities mean that there are too many things dangling . . . I go back to my letter that I sent to Bob Hickey and a copy to you saying that I thought this group should have the assistance and guidance of a good group of clinical investigators and a statistician, with no bias and no relation to the drug in the way of company, if that is possible.¹⁴⁴ (emphasis added)

A March 15, 1974 report from Dr. Hickey's subcommittee revealed that the same scientific issue was persisting: investigators disagreed on recommendations, largely because studies had been conducted with different designs with poor protocols.¹⁴⁵ Meanwhile, the scientists were perplexed over indications that the injection of simple saline solutions resulted in benefits almost equal to those of the drug. This inference, although dismissed during the Committee meeting by Dr. Crout, later proved to be fairly accurate.¹⁴⁶ The advisory committee ultimately

¹⁴⁰ *Id.* at p. 164.

¹⁴¹ Robert Hickey, M.D., Executive Secretary and Medical Director, Surgical Director, Surgical Division, M.D. Anderson Hospital and Tumor Institute, Houston, Texas.

¹⁴² See n.134, *supra* at p. 150.

¹⁴³ *Id.* at p. 161.

¹⁴⁴ Transcript of Surgical Drugs Advisory Committee Meeting, Department of Health, Education, and Welfare, Public Health Service, Food and Drug Administration, October 24, 1973, pp. 29-30.

¹⁴⁵ Transcript of Surgical Drugs Advisory Committee Meeting, Department of Health, Education, and Welfare, Public Health Service, Food and Drug Administration, March 15, 1974, p. 108. The study also revealed that 72 percent of the patients showed marked improvement; 14 percent showed slight improvement; 14 percent showed no improvement.

¹⁴⁶ Rene Menguy, M.D., Surgeon-in-Chief, Genesee Hospital, Rochester, New York. *Id.* at p. 177.

suggested approval of the drug's NDA, but under a Phase IV status: that is, the drug could be marketed, but users would have to report results continuously to the Agency, since concern about its safety persisted.

The Hickey subcommittee also rejected a proposal to conduct double-blind studies using Chymopapain and a placebo. (In such studies, neither the doctor nor the patient knows whether the solution injected contains the active drug or water. The test is conducted in such a way that observers may determine the effects without the bias of participating physicians or patients.)

Specifically, they felt that the use of an intra-disk placebo injection, which would not be of benefit but which could produce complications, was not justified and would not be acceptable to patients or to institutional review committees.¹⁴⁷

During the March 1976 hearings, Congressman Scheuer, a member of the Subcommittee, questioned Commissioner Schmidt about the duration of the Chymopapain issue:

MR. SCHEUER. In this case was there any need to spend 10 years or more than 10 years? Was there anything about the nature of this drug that required 15,000 injections before you found out that it was in effect a placebo? Wouldn't a proper research design in the IND phase have proven this in a matter of months as actually happened when Col. Albert Martin, chief of neurosurgery at Walter Reed, decided to conduct double blind on his own initiative? If he could do it in 10 months, why did it take your agency 10 years?

DR. SCHMIDT. Your characterization of this thing is your own. I certainly do not share, nor would the community of orthopedic surgeons in academia or any place else in this country share your characterization of what has turned out to be a very peculiar research experience.¹⁴⁸

Later during the Subcommittee's hearings, Dr. Crout acknowledged that the Agency's policy on the determination of protocols had changed relatively recently.

MR. SCHEUER. Then you have had a change of policy?

DR. CROUT. You bet, and that policy was not really in effect to the same extent in the 1960's. IND's were reviewed in the 1960's primarily for safety. So our own concerns about the quality of the workup of chymopapain began much later than they probably should and began much later than they would with the drug today.¹⁴⁹

In July, 1974, a survey of and by practicing neurosurgeons, registered in the American Association of Neurological Surgeons,¹⁵⁰ elicited the opinion that Chymopapain injections could result "in severe neurologic complications," and that the drug "should not be released for general use until extensive trial has been made in a large controlled (randomly selected) series of cases performed by neurosurgeons."¹⁵¹ Subsequent to this conclusion, some independent neurosurgeons and an orthopedic surgeon¹⁵² conducted controlled clinical trials and concluded that there was "no statistically significant difference between chymopapain and the placebo in regard to frequency

¹⁴⁷ Letter to Chairman John E. Moss, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, from Alexander M. Schmidt, M.D., Commissioner, Food and Drug Administration, July 25, 1975.

¹⁴⁸ See n.6, *supra* at pp. 538-539.

¹⁴⁹ *Id.* at p. 541.

¹⁵⁰ Questionnaire distributed by William Beecher Scoville, M.D., and David Silver, M.D., to all practicing neurosurgeons registered in the American Association of Neurological Surgeons.

¹⁵¹ *Id.* at pp. 3-4.

¹⁵² Including Fred C. Reynolds, M.D., Robert S. Knighton, M.D., and Colonel Albert Martin, M.D.

or degree of pain relief."¹⁵³ Meanwhile, Travenol had withdrawn its NDA. The Agency had indicated there was "no statutory basis for the approval of chymopapain for marketing."¹⁵⁴

At the request of Congressman Scheuer, the Subcommittee met on May 20, 1975 to consider chymopapain. In a prepared statement for the Subcommittee, Dr. Bernard J. Sussman, Professor of Neurosurgery at Howard University School of Medicine,¹⁵⁵ declared, on the basis of scientific investigations, that the drug "is now shown to be a dangerous, nonspecific enzyme which produces serious tissue damage wherever it is injected, and also provokes severe allergic reactions."¹⁵⁶ Following press accounts of Dr. Sussman's charges, the Subcommittee received letters from numerous persons who had received chymopapain treatments or had known people who had. Some patients described the drug as a "Godsend" and called Dr. Sussman's allegations irresponsible; others, who had suffered from various side effects, encouraged the Subcommittee to press its inquiry of the Agency's handling of the application.

The Subcommittee believes that the Agency accepted, without suitable criteria, the company's research design, thereby permitting more than 15,000 patients to be injected with a drug found in other investigations to be potentially dangerous. According to the Agency, it "does not usually undertake independent investigations of a drug to corroborate or disprove a drug company's findings."¹⁵⁷ According to the Director of the Agency's Office of Legislative Services in a letter to Chairman John E. Moss, the regulations state:

... if a particular finding is alarming, it must be reported immediately and the clinical investigation discontinued until such finding is adequately evaluated and a decision reached on whether it is safe to proceed.¹⁵⁸

The Subcommittee believes the death of a patient being treated by an experimental drug is cause for alarm.

Furthermore, FDA claims that 20 field investigations were conducted where Travenol or others reported a patient had suffered adverse reactions;¹⁵⁹ with proper followup and evaluation of these alleged investigations, the Agency should have examined closely the charges and taken appropriate action on the NDA.

Although the investigational new drug regulations require reporting of adverse effects, these reactions were not investigated nor acted upon effectively by FDA or Travenol.

The Agency should require an applicant to present scientifically unimpeachable proof of safety and effectiveness of a drug before approving full marketing.¹⁶⁰ Although the Federal Food, Drug, and

¹⁵³ The sample population in the survey was 384, with 2 deaths and 59 complications. Extrapolating to the population of 15,000 patients injected with Chymopapain the number of complications would be approximately 2,250.

¹⁵⁴ Letter to Dr. Robert S. Knighton and Dr. William F. Donaldson, from Alexander M. Schmidt, M.D., Commissioner, Food and Drug Administration, December 9, 1975, p. 1.

¹⁵⁵ Bernard Sussman, M.D., is a neurosurgeon at Howard University School of Medicine. He is the author of "Inadequacies and Hazards of Chymopapain Injections as Treatment for Intervertebral Disc Disease," *Journal of Neurosurgery*: 42 (April 1975).

¹⁵⁶ See n.132, *supra* at p. 1. The active enzyme in Chymopapain is the same as that used in commercial meat tenderizers.

¹⁵⁷ Letter to Chairman John E. Moss, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, from Robert C. Wetherell, Jr., Director of Legislative Services, Food and Drug Administration, June 13, 1976.

¹⁵⁸ *Id.* at p. 1.

¹⁵⁹ Letter to Chairman John E. Moss, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, from Robert C. Wetherell, Jr., Director of Legislative Services, Food and Drug Administration, June 24, 1975, p. 4.

¹⁶⁰ 21 U.S.C. 355(b).

Cosmetic Act requires applications to be accompanied by well-documented evidence of the drug's safety and effectiveness,¹⁶¹ the Agency should have the resources to undertake independent studies to confirm the manufacturers' findings. Should a violation of its regulations occur, such as failure to report adverse reactions, the Agency must be prepared to carry out appropriate legal action against the violators, as the law provides. (21 U.S.C. 332, 333, 334)

With an NDA, the Agency must be especially careful in examining designs for research, since the tests are performed on human subjects. With chymopapain, the lack of research protocol prevented the Agency from rendering the prompt but well founded judgment necessary to protect public health and safety. In the presence of a substantial risk to consumers, new drugs should not be approved for full marketing or, if approved, should be withdrawn.

D. ADVISORY COMMITTEES

The Subcommittee's investigation of chymopapain raises doubts about the uses of advisory committees. In a December 30, 1975 memorandum, Dr. William F. Donaldson¹⁶² stated that a recommendation he made to the Surgical Drugs Advisory Committee had been deleted from an official transcript.¹⁶³ Dr. Crout denied this charge at the Subcommittee's March hearings.¹⁶⁴ The Subcommittee has no way of ascertaining the truth of this charge as there appears to be a tendency for committee members to go off-the-record each time they offer judgmental remarks.¹⁶⁵ According to an August 20, 1976 letter from Dr. Schmidt to the Subcommittee, future advisory committee meetings, except those dealing with trade secrets and internal memoranda, will be open to the public, with full transcripts available.¹⁶⁶ If this policy is adhered to, and the definitions of trade secrets and internal memoranda are not abused, it should insure a greater measure of public accountability for the Agency and the members of the advisory committees. It should also help to guard against the unacceptable delays in determining safety that the Subcommittee has found in the case of chymopapain.

The Subcommittee is concerned with the advisory committees' propensity to hold closed sessions when important issues are discussed. Beyond that, transcripts of advisory committee meetings are incomplete when officials allow judgmental statements to be off the record.

Section 10(a)(1) of the Federal Advisory Committee Act states

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.¹⁶⁷

¹⁶¹ 21 U.S.C. 355(b)(1).

¹⁶² William F. Donaldson, M.D., is president of the American Academy of Orthopedic Surgeons.

¹⁶³ Memorandum from Dr. William F. Donaldson to Fellows of the American Academy of Orthopedic Surgeons, Dec. 30, 1975.

¹⁶⁴ See n. 6, *supra* at p. 542.

¹⁶⁵ See n. 134, *supra* at p. 162.

¹⁶⁶ Letter to John E. Moss, Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, from Dr. Alexander M. Schmidt, Commissioner, Food and Drug Administration, Aug. 20, 1976.

¹⁶⁷ Federal Advisory Committee Act, Section 10(c), 5 U.S.C. App. I.

Advisory committees of FDA must adhere to the Federal Advisory Committee Act (FACA, Pub. L. 92-463). As a scientific regulatory Agency, FDA employs a staff expert in their fields but not so omniscient that they cannot benefit from exchanges with other experts. Such experts on these advisory committees are intended by the Congress to augment the Agency's scientific resources. The Congress did not intend that they assume the Agency's decision-making responsibilities.

The most disturbing question raised by the Advisory Committee's February 12, 1973 meeting is whether FDA's use of advisory committees is proper; i.e., are committee members subject to pressure of influence to favor a certain decision. The subject of the meeting was the resubmission of the New Drug Application on Chymopapain. Dr. Crout presented the issue in this fashion:

... actually we should make a decision on this drug based upon the evidence at hand, which means the uncontrolled experiments and the testimony of experts.

If we go that route [without controlled data], we have to find the right group of experts to testify about this, because the last panel of experts we had said no, and the data now aren't any different from what they were a year ago.¹⁶⁸

Dr. Crout raises the option of FDA approval of chymopapain, without controlled data and after the previous panel suggested non-approval. This suggestion by Dr. Crout's if meant earnestly, impugns the integrity of the advisory process and FDA.

The chymopapain affair raises other serious questions. First, how is the agency to obtain sound evidentiary data? By Dr. Crout's own statements, the reported experiments were not controlled. The data had been challenged by advisory committee members.¹⁶⁹ Are the data furnished by the manufacturer deliberately biased? Dr. Crout states that FDA can get any group of experts it wants to testify; it is only a question of finding the right people. The Subcommittee finds this suggested action (i.e. of finding "... the right group of experts ...") is irresponsible. If it is typical, can the public trust the products which the Agency approves as safe and efficacious? At the Advisory Committee meeting, it was evident that the Agency did not know whether or not chymopapain was efficacious.

Dr. Crout told the advisory committee,

Let's divide it into three possible kinds of efficacy, and we are not sure about any one of them.¹⁷⁰

We also know from the transcript and the results of the questionnaire sent by Dr. William Beecher Scoville and Dr. David Silver of the Department of Neurosurgery, Hartford Hospital, in Hartford, Connecticut,¹⁷¹ that the use of chymopapain can cause paraplegia or an anaphylactic reaction. Consequently, the Advisory Committee was unwilling to affirm that the drug was safe, even if efficacious.

On the basis of the February 12, 1973 Surgical Drugs Advisory Committee meeting we must ask,

(1) Under what circumstances does FDA find it appropriate to convene a second or subsequent advisory committee?

¹⁶⁸ See n. 134, *supra* at p. 144.

¹⁶⁹ *Id.* at pp. 153-154.

¹⁷⁰ *Id.* at p. 153.

¹⁷¹ See n. 150, *supra*.

(2) What are the criteria of FDA for accepting the advice or following the recommendations of advisory committees on issues or questions of regulatory action?

The Subcommittee urges the FDA to delineate standards in conformity with the Federal Advisory Committee Act ¹⁷² to answer these two questions and to publish these standards as regulations.

E. CHLOROFORM

In the general duty to provide protection to the public the Congress expects all regulatory and scientific agencies to exchange, share, and coordinate information and programs relating to toxic substances or other common hazards.

The manner by which FDA interacted with the National Cancer Institute concerning chloroform offers insights into the way cooperative, collaborative, coordinative arrangements operate within HEW.

Chloroform, like nitrofurans, is a common product that has been judged to be carcinogenic.

The liver tumor-producing properties of chloroform were first described in animal experiments conducted by Eschenbrenner and Miller some 30 years ago.¹⁷³ Following with further experiments, Rudali reported similar results.¹⁷⁴

In 1972, the International Agency for Research on Cancer, on reviewing the question, asserted that "an assessment of the carcinogenicity of chloroform awaits further experimental evidence."¹⁷⁵

That year, the National Cancer Institute (NCI), a division of the Department's National Institutes of Health, undertook an animal study ¹⁷⁶ which led to findings that chloroform induces liver cancer in mice and renal tumors in male rats.¹⁷⁷

Although it is an ingredient of many popular cough medicines, chloroform is not highly regarded for treating minor coughs. An article in the *Wisconsin Medical Journal* in 1971 declared that "traditional expectorants such as . . . chloroform, etc., are of little value" and that "the use of these drugs . . . has not been shown to be superior to the expectorant action of hot liquids, or any other bitter tasting concoction."¹⁷⁸ Further, a 1973 editorial in the *Journal of the American Medical Association* stated that "there is a paucity of experimental evidence to support claims made for the expectorant constituents of cough mixtures. Sodium citrate, citric acid, chloroform . . . do not increase sputum volume, render mucous less viscous, or otherwise change bronchial secretions when administered in the doses present in antitussive (cough) mixtures."¹⁷⁹

Whenever serious questions of safety or efficacy are raised, FDA has an obligation to resolve them or obtain resolution. Based upon the *Wisconsin Medical Journal* questions in 1971, the International

¹⁷² Federal Advisory Committee Act, 5 U.S.C., App. 1.

¹⁷³ *Journal of National Cancer Institute*, 5, 251 (1945).

¹⁷⁴ UICC Monograph Series, 7, 138 (1967).

¹⁷⁵ IARC (International Agency for Research on Cancer, Lyon) Monographs on the Evaluation of Carcinogenic Risk of Chemicals to Man, Lyon, 1972.

¹⁷⁶ Letter to Alexander M. Schmidt, M.D., Commissioner, Food and Drug Administration, from Sidney Wolfe, M.D., Director, Public Citizens Health Research Group, Washington, D.C.

¹⁷⁷ *Federal Register*, Vol. 41, No. 70, Apr. 9, 1976, p. 15026.

¹⁷⁸ *Wisconsin Medical Journal*, 70, 153 (1971).

¹⁷⁹ *Journal of the American Medical Association*, 224, 621 (1973).

Agency for Research on Cancer questions in 1972, and the *Journal of the American Medical Association* questions in 1973, the Subcommittee believes that FDA should have taken positive steps to determine the safety and efficacy of chloroform several years ago. Further, FDA should have been diligent in monitoring activities of other agencies examining chloroform.

Although NCI's "Report on the Carcinogenesis Bioassay of Chloroform" was not formally received by FDA until March 1, 1976,¹⁸⁰ information concerning NCI's findings was available much earlier. At a November 19, 1975 meeting of the Environmental Protection Agency (EPA) Hazardous Materials Advisory Committee, it was stated that "the National Cancer Institute study has confirmed the carcinogenicity of chloroform."¹⁸¹ The Subcommittee's March 15, 1976 hearing found that Commissioner Alexander Schmidt was unaware of those preliminary findings at that time (November 1975).¹⁸²

The following month, on December 30, 1975, Dr. Sidney Wolfe, Director of the Public Citizen Health Research Group (HRC), asked FDA to ban the incorporation of chloroform in products under its jurisdiction.¹⁸³ Dr. Wolfe asserted that the use of chloroform in cough medicine, mouthwash, and dentifrices constitutes a threat to health. He quoted the NCI draft report, indicating that chloroform was carcinogenic.¹⁸⁴ Having received no response to his request, Dr. Wolfe's group on March 11, 1976, filed a complaint in U.S. District Court seeking injunctive relief to force FDA

* * * to take immediate action to remove from interstate commerce all drugs and cosmetics which contain chloroform on the ground that such products are adulterated and that the drugs are neither safe nor effective for the use for which they are intended.¹⁸⁵

The injunction was denied. Dr. Wolfe finally received a response to his letter from the Agency on May 6, 1976, denying his request that it order a recall of all marketed products containing chloroform.¹⁸⁶

Regarding the NCI chloroform report findings, J. Richard Crout, the Director of the Bureau of Drugs, told the Subcommittee:

The first I knew of its coming was through the announcement from the Health Research Group. Now that is merely because I want to receive reports like the Commissioner does in a formal way and *we don't want to intrude upon the Cancer Institute's right to finish up a report and put it out be demanding it (sic) in a premature fashion.*¹⁸⁷ (Emphasis added.)

However, a procedure existed in HEW to provide FDA with an early warning on chloroform. The General Accounting Office had indicated that "as a result of our discussions with NCI officials in July 1974 concerning dissemination of research results to regulatory agencies, NCI developed a 'memorandum of alert' to notify the agen-

¹⁸⁰ See n. 177, *supra*.

¹⁸¹ See n. 6, *supra* at p. 537.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See n. 176, *supra*.

¹⁸⁵ *Public Citizen Health Research Group v. Alexander M. Schmidt, Commissioner, Food and Drug Administration*, Complaint for Injunctive Relief, Civil Action No. 76-0405, filed March 11, 1976.

¹⁸⁶ Letter to Sidney Wolfe, M.D., Director, Public Citizen Health Research Group, from Alexander M. Schmidt, M.D., Commissioner, Food and Drug Administration, May 6, 1976, p. 2.

¹⁸⁷ See n. 6, *supra* at p. 620.

cies of positive carcinogenic findings *before the conclusive test results are available.*"¹⁸⁸ (Emphasis added.)

In addition, in December 1974, the Interagency Coordinating Committee for the National Cancer Program was chartered to assist the NCI Director in coordinating Federal cancer research programs by, among other things, providing for information exchange.¹⁸⁹ This committee consists of nine members from various Federal entities including the Food and Drug Administration, the National Center for Toxicological Research, the National Institute of Occupational Safety and Health, the Environmental Protection Agency, and nine members from within the Department.¹⁹⁰ The Agency's tardiness in learning about the results of the Cancer Institute Study and impending report is difficult to excuse in view of these mechanisms for both inter-agency and intra-department communication.

In early February 1976, the Division of Cancer Cause and Prevention of the National Cancer Institute made available evidence of kidney tumors in male rats and liver cancer in both male and female mice.¹⁹¹ When asked at the Subcommittee's March hearing if the National Cancer Institute report was submitted to the Agency for review, Dr. Schmidt said:

I had one member of the Food and Drug Administration who was a member of the group at NCI and he was involved in the preparation of the report. He was working then, in effect, for the NCI and not as my spy. I did not ask him to provide me with anything he could Xerox or anything like that. My understanding was that the committee wished to issue the report.¹⁹²

On March 1, 1976, the Agency formally received NCI's study, "Report on the Carcinogenesis Bioassay of Chloroform," confirming that chloroform induces cancer in mice and rats.¹⁹³

Finally, on June 29, 1976, the Agency issued final regulations in the *Federal Register*, to be implemented July 29, 1976, regarding chloroform as an ingredient of human drug and cosmetic products and chloroform in contact with food. Given strong evidence of chloroform's carcinogenicity, the Agency declared that:

... any human drug product containing chloroform as an ingredient (active or inactive) is a new drug and is misbranded and any cosmetic product containing chloroform as an ingredient is adulterated.¹⁹⁴

Thus, in the 7 months elapsed since November 1975, known chloroform products continued to be marketed. In view of this lag, the Subcommittee finds that the intra-agency coordination between the Agency and the National Institutes of Health failed to function promptly and diligently. The several months that lapsed while NCI prepared its final report, prior to formal notice to FDA, represent a period when the public was needlessly exposed to an avoidable carcinogen.

¹⁸⁸ "Federal Efforts To Protect the Public From Cancer-Causing Chemicals Are Not Very Effective." Report from the Comptroller General of the United States, MWD-76-59, June 18, 1976, p. 30.

¹⁸⁹ *Id.* at p. 32.

¹⁹⁰ *Id.*

¹⁹¹ See n. 4, *supra* at p. 419.

¹⁹² *Id.*

¹⁹³ See n. 177, *supra*.

¹⁹⁴ *Federal Register*, vol. 41, No. 129, June 29, 1976.

F. TURKEY MEAT MIXUP

In the course of its study, the Subcommittee found that officials are sometimes frustrated by a lack of coordination among agencies, or worse, a lack of understanding of the legal responsibilities of regulators. These failings are most critical where public health is concerned. The Subcommittee believes that all agencies share responsibility for insuring that consumers are protected from contact with unreasonably dangerous substances. Congress has delineated specific areas of jurisdiction to facilitate agency operations, not to preclude them from concerted efforts in the public interest.

In the case of ipronidazole, a drug added to turkey feed to prevent a disease known as "blackhead," the Food and Drug Administration's Bureau of Veterinary Medicine and the Department of Agriculture failed to communicate effectively when illegal residues of the drug, suspected of being carcinogenic, were discovered in turkeys in mid-1975. The following Memorandum of Conference describes how the Agriculture Department's Animal and Plant Health Inspection Service inadvertently impounded acceptable turkeys while turkeys from the dangerous lots were combined with other lots, processed into turkey rolls, and sold.¹⁹⁵

MEMORANDUM OF CONFERENCE

Between: Dr. C. D. Van Houweling (HFV-1), Dr. J. Johnson (HFV-400), Dr. P. Cazier (HFV-400), Mr. H. Friedlander (HFV-201), Mr. P. Sheeler (HFV-220), Mr. R. Zenk (HFV-220), Mr. J. Evans (HFV-220), and part time with Dr. H. R. Roberts (HFV-8).

A meeting was held to discuss the role of BVM when meat and meat products were found upon objective sampling by APHIS to contain tissue residues over tolerance. Dr. Cazier advised that he had received a memorandum from Mr. Zenk, which outlined recent events concerning an APHIS report of Iprnidazole residue in turkeys at a level of 48 ppm. Follow-up discussions with APHIS disclosed that initially they had inadvertently obtained the wrong grower name and that the lot of turkeys which they were holding was not the lot sampled. The lot from which an objective sample was collected was combined with other lots and processed into turkey rolls and shipped out from the establishment.

FDA inspector Mr. Sitgo thought FDA should assume responsibility for the lot that was processed and shipped. Mr. Sheeler thought the Division of Compliance of BVM should inform Bureau of Foods of this fact. He and Mr. Zenk spoke with Ralph Strand on July 18, 1975, who in turn asked to be provided with all information in the possession of D/C and that they would take regulatory action if it was necessary. Dr. Cazier stated that in a similar situation involving sulfaquinoxaline in ducks he had earlier expressed the opinion that D/C should not press APHIS for information about lots passed and released by them with the possible objective of product seizure by FDA.

It was pointed out by Mr. Friedlander and Mr. Sheeler that since the drug involved is a suspect carcinogen and we were not certain as to what control USDA still maintained in the matter, or whether the turkeys should be retrieved, it was felt that BF should be aware of the situation in the event that they thought action was indicated in order to protect the consumer.

Dr. Van Houweling pointed out that there seems to be a misconception that USDA does not have jurisdiction over meats or meat products once they leave

¹⁹⁵ Conference Memorandum, Bureau of Veterinary Medicine, Food and Drug Administration, July 22, 1975. Present: Dr. C. D. Van Houweling, Dr. K. Johnson, Dr. P. Cazier, Mr. H. Friedlander, Mr. P. Sheeler, Mr. R. Zenk, Mr. J. Evans, and part time with Dr. H. R. Roberts.

the inspection plants. He referred those present to the Wholesome Meat Act of 1967 which provided USDA with the authority to institute detention, seizure, or condemnation of meats or meat products should they find them adulterated. He did not believe that it was the Bureau's obligation to seek regulatory action on products which were the responsibility of USDA. He stressed that if the Bureau of Foods wished to institute action, they, of course, could do so. Or if USDA asked for FOA's assistance that we should surely assist. He did not feel that BVM should initiate such action and provide such information to BF from USDA unless we were requested to. BF can communicate directly with USDA on such matters if BF wishes to pursue them. Dr. Van Houweling instructed Mr. Sheeler not to solicit further information from USDA at this time or transmit information to BF on this incident until he talked to Dr. Roberts to ascertain his views regarding BF participation.

Following this meeting, Dr. Van Houweling did speak with Dr. Roberts who essentially concurred with the BVM position. Dr. Roberts agreed that meat was amenable to the FDC Act as well as the Meat Inspection Act. However, he agreed USDA had primary responsibility and that BF would not pursue any matters involving adulterated meat unless asked to by USDA or with their concurrence.

It was also pointed out by Mr. Evans that we must realize that as the drug residue program is now being carried out by FDA and USDA, there is the additional possibility that USDA, or for that matter FDA, may be embarrassed. That is, FDA is basing their criminal cases against growers found culpable for illegal drug residues reported by USDA through their objective sampling program. The food (meat) upon which we charge the grower as having caused a violation of the FD&C Act, in most cases is usually allowed to continue into commerce channels. Undoubtedly this will be brought out some time during a case and it could be difficult to explain why FDA is bringing criminal charges against an individual when USDA had allowed the adulterated food (meat) itself (upon which the charge is based) to enter the channels of commerce for human consumption. Dr. Van Houweling admitted that this might happen but that there was no practical way for APHIS to collect objective samples and retain several thousand birds until the assay results were returned a couple of weeks after the slaughter. Furthermore, the objective sampling program is not designed to prevent the distribution of adulterated food but to give an objective report of violative residues detected.

One additional point was brought up by Mr. Evans that USDA also operates under the Wholesome Poultry Products Act of 1968, and that both the meat and the poultry Acts may be in need of amendment since they do not define a "new animal drug" as an adulterant, as in the FD&C Act (402(a)(2)(D)).

Since the Act defines the term "food additive" as having the same meaning as under the FD&C Act, then New Animal Drugs are exempted and may have to be considered to be a poisonous or deleterious substance. Dr. Johnson made note of this.

C. D. VAN HOUWELING, D.V.M.

ADDENDUM

After consideration of all of the facts brought out during the meeting of 7/22/75 and the subsequent telecon with BF, it was the conclusion of Dr. C. D. Van Houweling that BVM would initiate no action against meat or meat products because of residues unless requested to do so by APHIS. There would be no bar in the future, however, to an exchange of information concerning residues with BF whenever in the opinion of Division of Compliance this would be desirable since BF has the primary responsibility for human food in FDA.

It is clear from this memorandum that the Food and Drug Administration inspector¹⁹⁶ discovered a report of ipronidazole residues in turkeys at a level of 48 parts per million. According to this memorandum, Mr. Sitgo contended that FDA should assume responsibility for the turkeys that were processed and shipped; Bureau of Veterinary Medicine Director C. D. Van Houweling, however, maintained

¹⁹⁶ *Id.* Identified in July 22, 1975 memorandum as Mr. Sitgo.

that primary responsibility rested with the Agriculture Department, and that the Food and Drug Administration should only have initiated action when specifically requested to do so by the Department of Agriculture.¹⁹⁷ Another Food and Drug Administration official said:¹⁹⁸

... we must realize that as the drug residue program is now being carried out by FDA and USDA, there is the additional possibility that USDA, or for that matter FDA, may be embarrassed.¹⁹⁹

During Subcommittee hearings, Commissioner Alexander M. Schmidt admitted there have been communication problems among Bureaus within the Agency. Dr. Schmidt testified:

I have never seen this memorandum, . . . I can say very clearly that I have been seeking mechanisms to try to insure close communication between BVM and the Bureau of Foods. This has been a problem in the past and I am trying to be positive and insure that the people working together know what each other knows.²⁰⁰

Beyond that, a statement submitted to the Subcommittee by the Food and Drug Administration indicates that the Agency and the Department of Agriculture have "concurrent jurisdiction over misbranding and adulteration of meat products after inspection,"²⁰¹ a provision the Subcommittee sees as making both Agencies as equally responsible in this case. In the addendum to the July 22, 1976 memorandum, Dr. Van Houweling concluded:

... that BVM would initiate no action against meat or meat products because of residues unless requested to do so by APHIS. There would be no bar in the future, however, to an exchange of information concerning residues with BF whenever in the opinion of Division of Compliance this would be desirable since BF has the primary responsibility for human food in FDA.²⁰²

At hearings held by the U.S. Senate in July of 1976, this memorandum of conference was discussed in the following manner:

Mr. EVANS There were certain items in the memorandum that had been deleted or changed around to other thoughts.

Senator SCHWEIKER. What parts were they?

What specifically was the problem that initiated drafting of—

Mr. EVANS. When the memorandum was initially drafted, Mr. Scheeler wanted to specifically in the memorandum to show that Dr. Van Houweling had given him instructions not to contact the Bureau of Foods. There were a couple other items in there dealing with the fact that—

Senator SCHWEIKER. The initial draft said you should contact the Bureau of Foods?

Mr. EVANS. Should not.

Senator SCHWEIKER. Should not.

Mr. EVANS. Should not contact the Bureau of Foods.

Senator SCHWEIKER. Some people did not want to sign that, is that correct?

Mr. EVANS. Right.

After Mr. Scheeler and Mr. Zenk and I had initiated off on the original draft, it was sent up to other participants at the meeting for their review. A third draft came down to us with those items deleted.

At that time, Mr. Zenk and I refused to sign it.

Senator SCHWEIKER. Did that not seem strange to you, this matter of whether to put or not to put the subject of whether to contact the Bureau of Foods in

¹⁹⁷ *Id.* at pp. 1-2. Food and Drug Administration regulations require that any animal drug residue in meat, milk, or eggs be proven safe and that the Agency set a limit or tolerance level, on the amount of the drug allowable in food. (21 C.F.R. 514.1 *et seq.*)

¹⁹⁸ *Id.* Identified in July 22, 1975 memorandum as Mr. Evans.

¹⁹⁹ *Id.* at p. 2.

²⁰⁰ See n. 6 *supra* at p. 628.

²⁰¹ *Id.* at 626.

²⁰² See n. 195, *supra* at p. 3.

a memorandum where you had a known contamination of a product that somebody was going to consume?

Let me put it this way.

If you were on the receiving end eating this product, how would you feel about it?

Mr. EVANS. I would want all the facts stated.

The thing that was strange was that there were certain items trying to be deleted for no reason that I could see at the time.

Senator SCHWEIKER. Finally in the drafting process, an addendum was added to it. I am sorry, after the memo was drafted, an addendum was added to it.

What did that addendum say?

Mr. EVANS. That addendum was added, I assume, by Dr. Van Houweling. I do not know for a fact that he himself added it, but I assume that he did. And it stated, in fact, that he had contacted—been in contact with the Bureau of Foods and that the Bureau of Foods concurred with his thought on it, but we would in the future contact the Bureau of Foods.

Mr. SHEELER. I would like to add one thing to what Mr. Evans said. It may not come across too directly, but very specifically, during the meeting, Dr. Van Houweling gave specific orders to contact neither the Bureau of Foods or the USDA to solicit additional information.

When the first memo was written by Mr. Evans, this paragraph was present in the draft. Subsequent revisions removed those instructions on the draft.

I would not sign off on the memo unless that paragraph was in the draft, which instructed us specifically not to contact the Bureau of Foods because the Bureau of Foods subsequently did contact us for additional information. And in accordance with the instructions that had been given to us. I could not give them additional information.

Upon receiving that draft with this deletion, I spoke to my Division Director, Mr. Leon Brunk and voiced by objection to that particular paragraph being deleted.

He said he would talk to Dr. Van Houweling in an effort to have that put back and possibly rescind the instruction that had been given to us. Subsequent to that conversation with Mr. Brunk, an additional paragraph was put into the memo stating that we could now talk to either USDA or the Bureau of Foods in this particular matter.²⁰³

It is essential that Agency officials maintain a sense of their common responsibility so that their prompt reactions may anticipate potentially dangerous situations. The Subcommittee is distressed by indications that Food and Drug Administration officials were more concerned with possible public embarrassment than with the maintenance of public health. The Subcommittee believes that the initial failure of the Bureau of Veterinary Medicine to communicate on the life-threatening situation of Iprnidazole was improper. The Subcommittee believes FDA should publish regulations on the exchange of information on matters of joint responsibility.

G. CONFLICT OF INTEREST

Because the maintenance of the public's health hinges significantly on the effective implementation of the Food and Drug Administration's mandate, Agency officials are expected to conduct themselves with the highest degree of integrity and competence. In order to carry out their designated tasks effectively, these officials must give the public confidence that they are indeed acting in the public interest. Unfortunately, past experience has shown that on some occasions FDA officials have placed themselves in positions where their personal interests potentially conflicted with their Agency's responsibilities.

²⁰³ Transcript of Joint Hearings of the Senate Subcommittee on Health of the Committee on Labor and Public Welfare, and the Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, July 20, 1976, pp. 10-13.

Food and Drug Administration provisions for personal standards of conduct assert—

... To assure that the business of the Food and Drug Administration is conducted effectively, objectively, and without improper influence or appearance thereof, all employees must be persons of the highest standards of conduct. Because of FDA's special regulatory responsibilities to the consumer and industry, its employees must be especially alert to avoid any real or appearance of conflict of their private interests with their public duties. Their actions must be unquestionable and free from suspicion or partiality, favoritism, or any hint of conflicting interest.²⁰⁴

The Subcommittee has examined the Food and Drug Administration's guidelines for employee standards of conduct²⁰⁵ to determine if there are sufficient safeguards against potential conflicts of interest that could hinder the Agency's regulatory responsibilities. In addition, the Subcommittee has taken note of the propensity of high level Food and Drug Administration officials to seek employment with regulated industries after the completion of their tenure with the Government, to ascertain the effect this trend has had upon the Agency's operations. In looking into this phenomenon, the Subcommittee found that—between November, 1971 and June 1975—of the 88 senior officials who left the Agency, 9 were employed by regulated firms immediately after terminating their employment with the Agency, 10 percent of the total leaving.²⁰⁶

Employees of the Food and Drug Administration who are not classified as being involved in "control activities"—those below GS-16 and those also considered by the Agency not to be in a position to create an economic advantage or handicap to a non-Federal enterprise²⁰⁷—may have financial interests in organizations only if (a) the organization's Food and Drug Administration-regulated activities constitute less than 10 percent of its yearly gross sales, (b) the employee holds less than \$5,000 in organizations with Food and Drug Administration regulated business activities, (c) their holdings constitute less than one percent of the company's outstanding stock, (d) less than one-half of their interests are concentrated in controlled firms, or (e) the employee is granted a waiver by his supervisor where the interest is "not likely to affect the integrity of his services to the government."²⁰⁸ In 1974, of the 61 employees with directly prohibited interests, 30 took divestiture actions, 14 applied for waivers, and 18 did not even respond to Agency divestiture letters.²⁰⁹

Provisions of the Food and Drug Administration's employee regulations also state that within 30 days of their appointment to control positions employees are required to submit to the Associate and Deputy Associate Commissioner for Administration and the Director, Division of Personnel Management, a detailed financial disclosure statement; this statement is updated annually on June 30.²¹⁰ In 1974,

²⁰⁴ 45 C.F.R. 73a.735-101(a).

²⁰⁵ 45 C.F.R. 73a.735. This section, "Standards of Conduct: Food and Drug Administration Supplement," serves as an addition to personnel standards of conduct for the Department of Health, Education, and Welfare, 45 C.F.R. 73.735.

²⁰⁶ "Extent of Deficiencies in the Financial Disclosure System for Employees," Subcommittee on Oversight and Investigations Staff Study, March 12, 1976.

²⁰⁷ 45 C.F.R. 73a.735-502(1) (i) (ii).

²⁰⁸ C.F.R. 73a.735-501.

²⁰⁹ "Financial Disclosure System for Employees of the Food and Drug Administration Needs Tightening," Report of the Comptroller General of the United States, FPCD-76-21, January 19, 1976, p. 11.

²¹⁰ 45 C.F.R. 73a.735-201.

about 2,500 Food and Drug Administration employees and about 900 consultants were required to file financial disclosure statements.²¹¹

In light of a 1974 Food and Drug Administration internal audit which revealed that 134 employees owned 181 interests which the regulations specifically prohibited, a January 19, 1976 General Accounting Office report concluded that the Agency had been lax in its administration of employee standards of conduct.²¹² Sixty of the employees had 73 prohibited interests which related directly to their responsibilities, according to the Agency; the General Accounting Office audit turned up 25 additional employees with 27 prohibited interests that the Agency had overlooked in its investigation.²¹³

The Subcommittee subsequently undertook an independent investigation to ascertain the exact nature of some of the most obvious examples of noncompliance with established Agency procedure.²¹⁴ One employee held interests totaling \$26,340 in three corporations (Pepsico, McCormick & Co., and CPC International) that are subject to substantial regulation by the Agency. On October 17, 1973, the individual reported these holdings and requested that he be permitted to retain them; as of January 21, 1976 more than 27 months later, he still had not disposed of the stock.²¹⁵ Employees of the Agency have also held stock in the General Electric Company (makers of cardiac pacemakers and other devices), American Brands Corp. (producers of distilled beverages, food products and toiletries), International Protein Corp. (distributors of fishmeal, shrimp and soybean meal), and numerous other firms with Agency-related affairs.²¹⁶

Since the Agency's regulations do not specify a timetable for deciding on exemption requests, it is conceivable that deliberations on this subject could continue indefinitely. Although there has been no evidence to suggest that the employees holding these and other interests actually influenced decisions prejudiced in their own favor, the mere appearance of a conflict of interest constitutes sufficient grounds for strict enforcement of the current FDA provisions.

This view conforms with the regulations which state that employee actions ". . . must be unquestionable and free from suspicion of partiality, favoritism, or any hint of conflicting interest".²¹⁷ FDA also should define conditions whereby employees are exempted from the Agency's conflict of interest provisions, if exemptions are allowed.

Title 18 of the United States Code²¹⁸ provides for a \$10,000 fine or imprisonment of not more than 2 years for employees who conceal conflicts of interest that may influence their activities relating to government decisionmaking. Although Food and Drug Administration Commissioner Alexander M. Schmidt told the Subcommittee during its March hearings that he did not believe that conflicts of interest have hindered the Agency's regulatory responsibilities, he did admit, in response to a question from Lowell Dodge, Subcom-

²¹¹ See n. 210, *supra* at p. 6.

²¹² *Id.*

²¹³ *Id.* at p. 8.

²¹⁴ See n. 6, *supra* at pp. 607-610.

²¹⁵ *Id.* at p. 608.

²¹⁶ *Id.* at pp. 607-610.

²¹⁷ 45 C.F.R. 73a.735-101(a).

²¹⁸ 18 U.S.C. 208(a).

mittee Counsel, on time lag in enforcement of financial disclosure regulations:

Dr. SCHMIDT. We were lax, it is true, and we were deficient, it is true, during this period and I am sorry. Particularly in view of the fact that it was that period when the GAO came in and "caught us with our pants down."²¹⁹

The Subcommittee has also considered how FDA is affected by the tendency of former employees to work for Agency-regulated enterprises or interests. A Subcommittee study of 88 senior Food and Drug Administration officials²²⁰ who left the Agency between November, 1971 and June, 1975, revealed that only 6 went to work directly for regulated firms; 3 others were employed subsequently as part-time consultants to regulated firms.²²¹ At the same time, in reviewing the employment data for 399 senior employees (GS 15 and up) at the agency as of June, 1975, the Subcommittee found that 38 had been appointed directly from regulated industries, almost 10 percent. Seventy-six other employees had experience in a regulated firm at some point in their careers, but were no longer working for a regulated firm when appointed. The remaining 285 of the Agency's senior employees had no prior experience with regulated industry.²²²

Of the four Agency Commissioners who preceded the present Commissioner, Dr. Schmidt, two left the Department of Health, Education, and Welfare to work directly for regulated firms.²²³

There are currently no provisions for the Food and Drug Administration to control the employment of personnel after they leave the Agency or require them to provide the Agency with information about their present occupation.

The Subcommittee recognizes that personnel with first-hand knowledge of industry operations—both scientific and administrative—provide invaluable assistance for the Agency's regulatory role; similarly, persons with internal Agency experience who are hired by regulated firms give the firms an advantage in dealing with the agency. These former employees may help the companies to anticipate agency actions. Acquaintance with agency employees may also provide means of unorthodox access to agency deliberations.

In the course of its investigation of conflicts of interest within the Agency, the Subcommittee found that officials have effectively circumvented the spirit of the published standards of conduct by requesting exemptions that the Agency takes a great deal of time to consider. While certain other government agencies—the Interstate Commerce Commission, the Federal Communications Commission, the Federal Power Commission, and the Civil Aeronautics Board—prohibit any employee financial interests in regulated business,²²⁴ the Food and Drug Administration's regulations which should be at least as stringent

²¹⁹ See n. 6, *supra* at p. 611.

²²⁰ All of these positions were filled competitively in accordance with Civil Service Commission rules and regulations.

²²¹ Item 12, Regulatory Reform Questionnaire, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, U.S. House of Representatives.

²²² All of these positions were filled competitively in accordance with Civil Service Commission rules and regulations.

²²³ Regulatory Reform Questionnaire, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, U.S. House of Representatives. See responses to questionnaire item No. 10. The Food and Drug Administration Commissioner and Deputy Commissioner are Schedule C employees—they are appointed by the President.

²²⁴ See n. 6, *supra* at p. 611.

are indeed less so. Further, the Agency has been lax in its enforcement of its current regulations.

The Subcommittee concludes that, because of the importance of the Food and Drug Administration's regulatory responsibilities, the Agency's financial interest regulations should be strengthened to include, at a minimum a total prohibition on ownership by regulatory employees of securities in industries directly subject to Agency regulation, without regard to the Food and Drug Administration's regulated percentage of the sales of individual corporations. Such a blanket prohibition with regard to FDA-regulated securities would help insure the integrity of the Agency's decisionmaking and would facilitate enforcement of the regulations by eliminating borderline cases (e.g., firms with eight to ten percent regulated sales). In response to this recommendation, the Agency has contended—

From the standpoint of employee equity, we are concerned that a total prohibition rule would lead to justifiable employee grievances on the premise that such restrictions far exceed the need to protect against potential conflicts of interest. Unlike other agencies, this point is especially germane in FDA's situation because the Agency's regulations already prohibit participation in any FDA matter relating to an employee's financial interests, regardless of the amount, value, 10 percent criterion or circumstances of retention. However 18 U.S.C. 208 does permit such latitude where an employee interest is too remote and inconsequential.²²⁵

The Subcommittee remains convinced, however, that a blanket prohibition on financial interest in regulated companies would completely eliminate the potential for abuse that the current regulations permit and improve public confidence in FDA.

The Subcommittee also recommends Agency action to minimize the adverse effects of interchanges of employees with regulated industries. While the Subcommittee has found no evidence that this interchange has actually affected the Agency's rulemaking and enforcement responsibilities, it is our strong view that serious abuse is a potential threat. Persons who leave the Agency for employment with regulated firms should be required to inform the Agency of their subsequent employment, to assist the Agency's monitoring of their later dealings with regulatory officials. The Subcommittee believes the Agency should make the importance of such information clear to all employees.

V. Agency Coordination

This report is not the first to deal with FDA. Examinations of the Agency have been frequent, and their conclusions consistent. They have focused on, among other things, FDA's enforcement capabilities, the merit of its scientific judgments, its internal administration, and its coordination with other agencies.

The studies conducted concerning the FDA have included 47 reports prepared by the General Accounting Office from 1969 through 1975. They have included numerous Congressional hearings and reports, most notably those by the Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary and the House Subcommittee on Intergovernmental Relations of the Committee on Government Operations.

²²⁵ *Id.* at p. 613.

FDA's own Division of Management Systems and Policy has conducted some 147 studies and surveys between 1966 and 1975. The FDA has also been the subject of at least 25 studies conducted by other independent groups outside the Administration.

Over the years, the conclusions reached and the recommendations made by the many people who have examined the activities of the FDA, have been consistent and recurrent.

In December, 1969, a report known as the "Malek Report"²²⁶ recommended the streamlining of many FDA review processes, the creation of a committee to be responsive to consumer interests, and other reorganization efforts. Five months later, the "Kinslow Report"²²⁷ criticized the Administration's inability to respond to consumer concerns and recommended the development of programs that would inform the consumer and provide for more consumer influence on FDA activities. The "Ritts Report"²²⁸ issued in 1971 again questioned FDA's responsiveness as well as the quality of its scientific data.

The list of studies includes similar conclusions reached by GAO and various Congressional committees. Had these criticisms been recent, it would be logical to allow the FDA sufficient time to alleviate its own problems. They are not recent, but have spanned many years. FDA has not conspicuously reacted. In view of past inaction, it would be illogical to think that another report with critical conclusions and recommendations would stimulate FDA to undertake broad-scale actions to improve its enforcement, science, administration, and coordination.

A different course of action must now be proposed. The first step is to take the FDA out of the multifaceted Department of Health, Education, and Welfare and to consolidate it in one coordinated independent agency with regulatory responsibilities over all consumer health and safety matters.

This suggested reorganization is not novel. It was the subject of extensive debate during the consideration of the Consumer Product Safety Act.²²⁹ A brief review of that debate is necessary as a foundation for this Subcommittee's recommendations.

Much of the substance of the ultimate Consumer Product Safety Act, and its rationale, was based on the work of the National Commission on Product Safety. The Commission recommended the creation of an independent Consumer Product Safety Commission giving it jurisdiction over all products used by the consumer including those which were under the jurisdiction of the Food and Drug Administration, except to the extent that they were regulated by "duly promulgated regulations."²³⁰ The Commission based much of the recommendation upon the findings of a study it had commissioned known as the "Heffron Report."²³¹ Central to the recommendation of the

²²⁶ "The Food and Drug Administration Organizational Review," Frederick V. Malek, Deputy Undersecretary, Department of Health, Education, and Welfare, December 10, 1969.

²²⁷ "Report From the Study Group on Food and Drug Administration Consumer Protection Objectives and Programs," Department of Health, Education, and Welfare, May 1, 1969.

²²⁸ "Report to the Commissioner of Food and Drugs From the FDA Ad Hoc Science Advisory Committee, May 1971.

²²⁹ Public Law 92-573.

²³⁰ Consumer Product Safety Bill Proposed by National Commission on Product Safety, Section 33(b), June 1970.

²³¹ "Federal Consumer Safety Legislation, A Special Report Report Prepared for the Commission on Product Safety," June 1970.

"Heffron Report", released in 1970, was that one independent agency have jurisdiction over all consumer safety activities. The report concluded that:

The Federal role is to encourage movement and active concern with respect to safety, to promulgate and oversee compliance with safety standards, and to regulate those who unreasonably violate their duty to produce safe products—all this without upsetting the creative and innovative forces of the free enterprise system.

The proposed Commission should have an independent status, concerned exclusively with the safety of consumer products. If it is subordinated to a larger agency administering other equally comprehensive programs, the emphasis on consumer safety is certain to suffer.

Protection of the public interest will be strengthened if the agency has authority to make its own final decisions, free of restriction by a parent agency, and if its funds are sufficient and its activities highly visible.²³³

After much consideration, the Senate passed a bill²³³ creating an independent food, drug and consumer product safety agency which would have jurisdiction over food and drugs as defined by the Federal Food, Drug, and Cosmetic Act.

In its report on S. 3419, the Senate Committee on Labor and Public Welfare stated that:

The primary components of the new agency would come from the Food and Drug Administration, currently in the Department of Health, Education, and Welfare. Since its creation in 1906, FDA has functioned under several larger agencies and undergone many reorganizations. In none of these organizational structures and in none of these departments has the FDA been able to achieve optimum results. Repeated GAO reports and the work of Congressman Fountain's Subcommittee and others have brought many of these failures to light.

FDA's shortcomings have not been a matter of partisan politics; the same kinds of problems have plagued the FDA in Democratic as well as Republican administrations. Under all administrations, the agency has failed either to provide full protection to consumers against unsafe products or to articulate clear regulatory policies to industry.²³⁴

The rationale for the placing of the Food and Drug Administration in the Department of Health, Education, and Welfare initially was not well founded. Except for FDA, the basic health programs of DHEW are directed toward research and delivery systems, rather than regulatory work. The regulatory functions of FDA are so small a part of HEW's total responsibility, they cannot receive the attention from that Department that they deserve.

The Food and Drug Administration must always act through the Assistant Secretary for Health, the Undersecretary, and then the Secretary of Health, Education, and Welfare. To be effective, the agency must be free from the restraints of competing policies, priorities, and objectives.

Even the Department of Health, Education, and Welfare was strong in its support of the proposal to have all consumer protection efforts consolidated in a single agency, though it recommended that agency should be in the Department. In testimony before the Senate Commerce Committee, Secretary Richardson stated that:

Centralizing these responsibilities will give Federal consumer protection efforts a single direction; that is, a more rational ordering of regulatory priorities

²³³ *Id.*

²³³ S. 3419, "Food, Drug, and Consumer Product Safety Act of 1972," June 21, 1972.

²³⁴ "Report of the Senate Committee on Labor and Public Welfare, on the Food, Drug, and Consumer Product Safety Act of 1972," 92d Cong., 2d sess., June 5, 1972.

than is now possible, as well as coordinated, and therefore, enhanced, enforcement.²³⁶

The most common argument advanced against removal of FDA from HEW is FDA's ability to communicate with other agencies within the Department for scientific and technical research and advice. Such an argument does not appear valid. First, it is clear, as shown in the chloroform case in this report, that coordination is often haphazard at best.

Second, new legislation could, and should, establish government-wide cooperation in scientific exchange and research, as in the Senate bill on the Consumer Product Safety Act.²³⁶

Perhaps the most succinct justification for the proposed agency is found in the report of the House Committee on Interstate and Foreign Commerce concerning the Consumer Product Safety Act and its recommendation for a consolidated independent agency. The report stated:

... This decision reflects the committee's belief that an independent agency can better carry out the legislative and judicial functions contained in this bill with the cold neutrality that the public has a right to expect of regulatory agencies formed for its protection. Independent status, and bi-partisan commissioners with staggered and fixed terms, will tend to provide greater insulation from political and economic pressures than is possible or likely in a cabinet-level department. The Commission's decisions under this legislation will necessarily involve a careful meld of safety and economic considerations. This delicate balance, the committee believes, should be struck in a setting as far removed as possible from partisan influence. Also, the creation of a new independent agency, it is thought, will assure that the regulatory program contained in this bill will be highly visible to get off to a firm and vigorous start.²³⁷

VI. Conclusions and Recommendations

The Subcommittee believes that a number of deficiencies cited in this chapter must be ended if FDA is to protect the public health with diligence. During the course of its investigation, the Subcommittee found—

A. Enforcement powers provided by Congress were frequently underutilized.

(1) The agency failed in the case of nitrofurans to determine whether manufacturers and distributors were obeying provisions of new drug approvals.

(2) The agency neglected, in the case of cardiac pacemakers, to verify manufacturers' claims that they were eliminating defects in medical devices and also failed to determine that companies had alerted all users of defective instruments of the operating defects.

(3) The agency's narrow definition of situations warranting invocation of its imminent hazard powers denied the public prompt protection from the nitrofurans hazard.

B. Several problems adversely affecting the Agency's administration—

²³⁶ Hearings Before the Senate Committee on Commerce, on the Consumer Product Safety Act of 1971, 92d Cong., 1st sess., July 19, 1971, p. 100.

²³⁶ S. 3419, Section 114.

²³⁷ Report of the House Committee on Interstate and Foreign Commerce, on the Consumer Product Safety Act, 92d Cong., 2d sess., p. 24.

(1) Inordinate delays in processing evidence of drug hazards prevented the agency from acting expeditiously to avert further exposure of the public to potential harm.

(2) The agency learned of some product failures only secondhand and failed to follow up the manufacturers' recalls when it should have been leading efforts to recall defective products.

(3) The agency neglected to insure that employees observed its conflict of interest regulations.

a. The employment of former agency officials by regulated companies has tarnished the agency's public image, possibly compromised the agency's objectivity, and eroded confidence in successful execution of FDA responsibilities.

b. The review and divestiture process generally has been too lenient and time-consuming; exemptions should be processed expeditiously. The agency has failed also to follow up on holdings reported by employees and seems reluctant to take definitive action to rectify questionable situations.

(4) The agency has misused its powers to constitute and operate advisory committees, despite the availability of governmentwide guidelines in the Federal Advisory Committee Act.

a. The administrative practice of closing meetings weakens the credibility of and denies the public an opportunity to appraise committee findings.

b. At least one Advisory Committee appears to have been subject to manipulation by the agency.

(5) The agency's bureaus failed to meet their responsibility to the public by not communicating effectively among themselves regarding recall of dangerous products while the Food and Drug Administration itself did not furnish pertinent information on its activities to other government entities.

(6) The agency failed to utilize its resources correctly in order to determine, with respect to cardiac pacemakers, if legal action was needed to penalize failure to correct defects. The agency's laxness encourages the flouting of its regulations by regulated entities and its own employees.

(7) The agency continues to be restrained in its regulatory focus by competing policies and objectives within the Department of Health, Education, and Welfare. This leads to a lack of a centralized consumer protection effort and to Departmental neglect of FDA needs and deficiencies.

C. The agency suffers from a number of inadequacies in its use of scientific data.

(1) Some protocols for research by manufacturers yield data that are insufficient and inadequate to allow FDA to judge safety and efficacy of drugs.

(2) The agency failed to verify scientific data submitted by industry.

The Subcommittee's recommendations are as follows:

A. The agency must, if it is to act effectively, utilize the total range of powers that Congress has established. If the agency feels that it lacks sufficient authority, it should either establish new rules or request new statutory authority to protect consumers and monitor

industry. In particular, the agency should revise its definition of its "imminent hazard" authority and suspend drugs when there is a *substantial likelihood* that exposure, *e.g.*, continuing use of the drug in the course of the procedures to withdraw the product will cause further harm to the public, even though the final results of that exposure will not be evident immediately.

B. The agency, in its annual report to Congress, should include a thorough description of action on New Drug Applications, Investigational New Drug Applications, New Animal Drug Applications, and Investigational New Animal Drugs. In this regard, the agency should require comprehensive data on safety and efficacy for new drugs.

C. The agency should take steps to insure that it is kept abreast of the performance of all drugs, devices, and other products that it approves for marketing. It should also monitor closely the activities of industry to ensure maintenance of proper manufacturing and research standards.

D. The agency should tighten its regulations on security holdings by employees by prohibiting the holding of securities in industries subject to agency regulation. This should accompany complete monitoring of the FDA-related activities of former employees on behalf of regulated firms.

E. The agency should insure that all advisory committees are constituted and proceed according to the guidelines established for openness by the Federal Advisory Committee Act. With regard to closed meetings, the agency should be sure that the closure of any meeting is accompanied by a clear explanation why it should not be open. In addition, verbatim transcripts for all meetings—closed and open—should be maintained.

F. The agency should participate in inter-agency committees and other systems of exchanging information with other departments, agencies, and bureaus, to assure that, where necessary, they may act in concert to carry out the common purpose.

G. The agency should take steps to establish acceptable scientific protocols and to monitor effectively the scientific competence of industry and other entities to insure that data is accurate and complete. The Subcommittee also recommends that Congress consider legislation, such as would empower FDA to arrange with university hospitals for controlled trials or with scientists engaged in animal studies, to enable the agency to strengthen the scientific basis for its regulations.

H. Congress should establish a single consumer safety and health agency that would bring about consolidation and coordination of regulatory responsibilities over all health and safety matters currently vested in the Food and Drug Administration, the Consumer Product Safety Commission and the National Highway Traffic Safety Administration.



FEDERAL REGULATION AND REGULATORY REFORM

PART III

INTERSTATE COMMERCE COMMISSION

FEDERAL POWER COMMISSION

FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 9

INTERSTATE COMMERCE COMMISSION

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CHAPTER 9

INTERSTATE COMMERCE COMMISSION

I. Summary

The Interstate Commerce Commission (ICC) is the oldest of the independent Federal regulatory agencies. Originally designed to protect the public from monopolistic practices by the railroads, the Commission's jurisdiction has been extended to trucks, barges, freight forwarders, and oil pipelines. Today the Commission's mandate includes both regulating and promoting the inherent advantages of each mode of surface transportation. The Subcommittee questions the Commission's success in attempting to harmonize its promotional and regulatory functions.

The Interstate Commerce Commission was the first major experiment in economic regulation on a national scale. The Commission's quasi-legislative, quasi-judicial, and administrative responsibilities and powers emerged from specific policies of the Congress written in reaction to major problems in the Nation's transportation system.

The administration of the Commission's compliance program as now organized, contains many serious shortcomings which frustrate the aims of national transportation policy. The compliance program suffers from a lack of policy direction and guidance; excessive attention to economically insignificant cases; discrimination against small carriers; insufficient penalties to deter illegal activity; and a seeming incapacity to coordinate actions and to use resources efficiently.

A positive aspect of the Commission's regulatory program is the development of the Office of Public Counsel. Under the direction of the Rail Services Planning Office, the Commission fathered the first Federal Office of Public Counsel to assist and represent the public in the complicated process of reaching decisions on railroad reorganization. The Office of Public Counsel proved to be a successful experiment in increasing public access to the Federal decisionmaking processes. Its contribution has been constructive. The newly expanded and more powerful statutory Office of Rail Public Counsel unfortunately has been blocked by the President's refusal to perform his legal duty to fill the vacant office of the director.

The need for an integrated policy planning program at the Commission is still evident, although the Commission's planning capabilities have improved. It is widely agreed that policy planning is essential to meet the goals of national transportation policy and other Congressional mandates. The Commission has taken constructive steps to improve its capabilities to plan and set policies but the Commission's Policy and Planning Committee has failed to function for lack of a clear set of priorities.

A few of the major obstacles faced by the Commission are illustrated by its relations with the Office of Management and Budget, the Department of Transportation, and the Congress. It is clear that these difficulties have hampered the Commission in its attempts to achieve the goals of national transportation policy swiftly and efficiently.

The Subcommittee recommends fundamental changes in the Commission's structure and mandate. The Commission's compliance program should be reorganized completely. The Congress should clarify the Commission's vague and contradictory mandate. Law modernization and codification of the relevant transportation statutes and of the Commission's own proceedings should be brought about as swiftly as possible.

The Office of Rail Public Counsel should be expanded to include all modes of transportation covered by ICC. The Commission should also develop a national surface transportation plan and a mechanism to assure that criteria established in the plan are reflected in all Commission decision-making processes.

Promotional aspects of the Commission's mandate should be removed and the Commission's support of entry barriers should be terminated. The Congress should also review Commission experience with the new provisions for flexible rail rates contained in the Railroad Revitalization and Regulatory Reform Act of 1976 and consider whether comparable authority should be provided for motor carriers.

The Subcommittee suggests also that the newly created Transportation Policy Study Commission and the Congress carefully examine the Commission as it is now constituted to determine whether it is the best organizational form through which to regulate surface transportation.

II. History and Mandate

The Interstate Commerce Commission, created by Act of Congress in 1887,¹ was the first independent regulatory commission. It is responsible for promoting "safe, adequate, economical, and efficient service" in surface transportation.² Moreover, the Commission is responsible for "fostering" a healthy economic environment for carrier operations while "encouraging" the creation of "reasonable charges for transportation services without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."³ At the same time, the Commission is responsible for developing the inherent advantages of each mode of transportation in an effort to insure sufficient service to all parts of the Nation.⁴ The Interstate Commerce Commission's mandate, as it has itself stated, is to insure that the American public has an adequate and efficient surface transportation system under private ownership, one that gives equal treatment to all.⁵

One of the largest independent agencies examined in this report, the Interstate Commerce Commission's budget now stands at \$54.6 million,⁶ with more than 2,100 employees.⁷ In recent years, the Commission has grown significantly as indicated on the chart below:

¹ 24 Stat. 379.

² 49 U.S.C. § 1.

³ *Id.*

⁴ *Id.*

⁵ In response to Subcommittee Questionnaire, June 1975, question 1.

⁶ Authorization for 1977, The Federal Budget of the United States Government, fiscal year 1977, U.S. Government Printing Office, 1976.

⁷ *Id.*

	1972	1973	1974	1975	1976
Appropriation:					
Amount.....	\$30,640,000	\$33,720,000	\$37,190,000	\$44,470,000	\$50,755,000
Positions.....	1,865	1,865	1,960	2,067	2,122

A. LEGISLATIVE HISTORY OF THE INTERSTATE COMMERCE ACT

1. *The basis for regulation.*—As the historical development of the Interstate Commerce Commission and its major governing statutes demonstrates, the Commission's mandate has been revised so frequently that it is neither consistent nor clear. A review of the successive statutory additions is necessary to understand the present status of that mandate. The legislative development is also worth recounting in some detail since the Interstate Commerce Commission was this country's first major venture into Federal regulation by commission.

The constitutional basis for Federal regulation of interstate commerce is rooted in Article I of the Constitution. Section 8 of that Article authorizes Congress—

to regulate commerce with foreign nations, and among the several states . . . and also

to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .

This power was not fully exercised, however, until 1887, a decade after the Supreme Court, in *Munn v. Illinois*,⁸ upheld the State of Illinois' right to regulate grain elevators. The decision stimulated the long series of government regulatory actions, culminating in the formation of numerous independent and executive branch regulatory agencies.

The decision stated that State regulation of the grain elevators in question was not a violation of "the exclusive domain with the Congress in respect to interstate commerce."⁹ Rather, the Court viewed this type of regulation as merely a "domestic concern" and ruled:

until Congress acts in reference to their interstate relations, the state may exercise all powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction.¹⁰

By the time the Congress voted to exercise Federal power to regulate interstate rail commerce through the creation of the Interstate Commerce Commission, some 25 State railroad regulatory bodies had been created. The power and aggressiveness of the regulatory bodies varied. In the Midwest, they tended to be more powerful and even "belligerent." Those in the Northwest tended to be weak and merely advisory.¹¹ Their structure was nevertheless similar: for the most part they consisted of three or more members organized in a collegial way, forming a commission.

2. *The railroad problem.*—State regulatory programs were, however, unable to cope with difficulties besetting the railroads and their clients. Abuses by the railroads developed most directly from "State

⁸ *Munn v. Illinois*, 94 U.S. 113 (1877).

⁹ *Id.* at 135.

¹⁰ *Id.*

¹¹ Robert Cushman, *The Independent Regulatory Commissions*, (1941) (hereinafter cited as Cushman) at 26-28.

and Federal generosity, unaccompanied by any effective disciplinary restrictions."¹² Vigorous Federal and State promotion of railroad construction, through loans, land grants, and liberal charters, had created powerful oligopolies in the preceding half century of railway growth. Promotion of the railroads was considered essential to national commerce.

By the 1860s, there were too many criss-crossing lines and too little traffic to support them. As a result, cutthroat competition for traffic became prevalent. The railroads engaged in such activities as charging more for the short haul than the long haul, establishing discriminatory rates, and granting rebates to large shippers. They tended also to seek control of the economies of large areas through such devices as pooling and monopolization of other nontransportation industries. The organization of the Grange was in large part the farm population's response to this exploitation.¹³

The final blow to State regulation of the rails came in 1886 with the Supreme Court's decision in *Wabash, St. Louis and R.R. v. Illinois*.¹⁴ Although not ruling against the ability of the State to regulate the fares and charges of the railroads, the Court drew a clear distinction between the broader and more inclusive interstate and the more restricted intrastate regulation. The States could not, the Court decided, "attempt to apply to transportation through the entire series of States . . . its own methods to prevent discrimination in rates." The Court held that this type of "regulation of commerce," was "national in character" and therefore the responsibility of the Congress of the United States.¹⁵ The *Wabash* decision came at a fortuitous moment for the proponents of Federal regulation by Commission.

The Interstate Commerce Act of 1887 may be traced to the passage by the House of Representatives of a bill 9 years earlier sponsored by Representative John Reagan of Texas. Although the first Reagan bill died in a Senate committee, Representative Reagan continued to introduce bills to regulate the railroads until he was successful.

The Reagan bill which went to the Conference Committee in 1886 was broader in scope than the final 1887 Act to Regulate Commerce and, provided for judicial enforcement and included stronger sanction provisions.

¹² *Id.* at 37.

¹³ *Id.* at 38, 41.

¹⁴ 118 U.S. 557 (1886).

¹⁵ *Id.* at 577. Mr. Justice Miller delivering the opinion for the court stated: "We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law. Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the State legislature to determine that question. But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution."

On the other side of the Capitol, Senator Shelby M. Cullom (R-Ill.) proposed much less severe regulation. His bill creating a national regulatory commission passed the Senate in January of 1885.¹⁶

Since the Senate consistently favored limited regulation by commission while the House favored strong regulation with judicial enforcement, a deadlock ensued in the conference committee. A select Senate committee appointed to study the issue recommended legislation akin to the Cullom bill.¹⁷ The House held to its own position.

The deadlock persisted until the *Wabash* decision and the *Railroad Commission Cases*¹⁸ intensified public pressure for Congressional action. The conference committee and finally the entire Congress approved the Cullom bill.¹⁹ In the rush to pass the legislation, the Congress failed to address many of the politically sensitive issues concerning the Government's role in regulating the railroad industry.

To many, the measure finally agreed upon did little more than shift the debate from the floor of the Congress to the hearing rooms of the Commission where the railroad industry could more readily exert its influence.²⁰

(a) *The act to regulate commerce.*—The Act to Regulate Commerce (Interstate Commerce Act) created, for the first time in American history, a bipartisan regulatory commission charged with regulating a domestic industry. The Commission was composed of five individuals appointed by the President for a 6-year term and confirmed by the Senate.²¹

In the years immediately preceding enactment of the Interstate Commerce Act, a battle raged on the pros and cons of regulation by a commission structure. Those arguing against a commission pointed to the State commissions' failures. They argued that a commission could easily become a "political football" and a "captive" of the regulated railroads, incapable of delivering regulatory action when and

¹⁶ This history is described in Cushman, *supra* note 11, at 42-43.

¹⁷ S. Rep. No. 46, 49th Cong., 1st Sess., p. 1 (1886). The Cullom Report concludes that: (1) The public interest demands regulation of transportation. (2) It is the duty of the Congress to undertake the regulation of the business of transportation. . . . (3) National legislation is necessary to remedy the evils complained of. . . . (4) National legislation is also necessary, because the business of transportation is essentially of a nature which requires a uniform system and method of regulation which the national authority alone can prescribe. (5) The failure to act is an excuse for the attempts made by the railroads to regulate the commerce of the country in their own way and in their interests. . . ." Cullom Report cited in Bernard Schwartz, ed., *The Economic Regulation of Business and Industry*, Vol. 1, 59-61 (1973) (hereinafter cited as Schwartz.)

¹⁸ 116 U.S. 307 (1886).

¹⁹ Cushman adds that combining the *Wabash* decision with "the decision in the Railroad Commission Cases, which upheld the legality of the state regulatory Commission, exerted a profound influence upon the conferees struggling to effect a legislative compromise between the Senate and House bills." (Cushman, *supra* note 11 at 44.)

²⁰ Manver Bernstein, *Regulating Business by Independent Commission*, at 25 (1955). (Hereinafter referred to as Bernstein.) Bernstein also quotes Judge Reagan's address on the House floor in 1886 in which he expressed his belief that the Commission could easily become a tool of the railroad industry through influence on the appointment process. Judge Reagan stated: "I shall fear that the railroad interests will combine their power to control the appointment of the commissioners in their own interest. We all understand how easy it is for a few persons controlling larger interests to unite their influence to carry out their wishes. . . . The notorious facts as to how railroad managers have corruptly controlled Legislatures, courts, governors, and Congress in the past give us sufficient warning as to what may be expected of them in the future. It is not to be supposed that they would directly approach any President of the United States and corruptly propose to secure the appointment of commissioners in their own interests; but the vast resources which they control, with the power of levying any tribute they please on the commerce of the country to secure means for the employment of men, enables them to control the best legal and business talent of the country, and would enable them to procure influential men in their interest to appeal to the President in the name of justice and on account of capacity to appoint such men as would serve their purposes."

²¹ 24 Stat. 379.

as needed. Moreover, it was felt that a single commission would lack the political power to regulate a national industry and could through "exercise of its discretion" seriously "soften the force of the regulatory statute." Since Congress could not direct the commission in each and every instance of its regulatory responsibilities, therefore, the opponents of the commission structure argued, any ambiguities in the law or discretion granted the commission would result in decisions favorable to the railroads.²²

Proponents of the commission system stressed its flexibility. They argued that a flexible administrative body was a more appropriate instrument for developing and enforcing regulatory law than a rigid court process and stressed the Commission's ability to defend the rights of the public and shippers against the railroads, a function the courts could not assume. The expertise developed by members of the commission, it was argued, could be utilized to create future policy, another major advantage. The commission was visualized also as an out-of-court umpire between competing and conflicting sides.²³

The ultimate triumph of proponents of the commission structure, however, probably was due more to congressional desire to enact some legislation in the face of growing public dissatisfaction than to the strength of their arguments.²⁴

During the debate on the Interstate Commerce Act, no mention was made of the independence of the commission.²⁵ The 1887 Act placed the commission under the protective wing of the Department of the Interior. At that time, the Congress seemed more concerned with securing a bipartisan commission than ensuring its independence. Independence did not become an issue until 2 years later.

Fearing the possible adverse effects of the President's power to influence the commission, Congressman Reagan mustered support for a bill to make the Interstate Commerce Commission independent of the Executive.²⁶ Reagan's bill, signed in 1889, established the first independent regulatory commission in the United States.

Louis Brownlow, a noted scholar of regulation, argues that the creation of the independent commission was "an historical accident."²⁷ In an often quoted passage from his testimony before the Senate in 1951, Brownlow suggested that it was Representative Reagan's belief that President Harrison should not be allowed directly to influence railroad regulation which was the overriding factor in the creation of the independent commission. So began the tradition of the independent regulatory agency. Brownlow testified that "thereafter any bill or regulatory matter that came to the Interstate and Foreign Commerce Committee resulted in the appointment of a commission."²⁸

(b) *The judicialization of the Commission.*—With the appointment as its first chairman of one of the leading constitutional lawyers of the

²² Bernstein, *supra* note 20, at 25.

²³ *Id.* at 29.

²⁴ Cushman writes that although the railroads "brought terrific pressure to bear to defeat the bill," it passed because "public opinion, aroused by the crisis created by the Wabash decision, demanded action." Cushman, *supra* note 11 at 44.

²⁵ Cushman argues that the question of independence was not an issue in the creation of the Interstate Commerce Commission in 1887. He writes: "the word independence does not appear in the legislation debates and the problem itself escaped direct consideration." Cushman cited in Bernstein *supra* note 20 at 26.

²⁶ Bernstein *supra* note 20 at 23.

²⁷ Brownlow cited in Bernstein *supra* note 20 at 23.

²⁸ *Id.* at 23.

day, the Commission assumed a judicial posture. Thomas M. Cooley (chairman from 1887 to 1891) conceived of the Commission's function as merely to "play umpire between competing interests."²⁹ He employed a case-by-case approach to regulation. Believing that such an approach could " * * * overcome the disadvantages of the legislative and judicial processes," Cooley operated the Commission as a surrogate court dealing exclusively with regulation of the railroads.³⁰ Consistent with his view of the role of his commission, Cooley fought hard, but without success, to secure legislation which would make ICC decisions final.³¹ Without such authority, the Commission had to appeal continually to unsympathetic courts for enforcement of its findings.

Cooley's argument that "determining a reasonable rate was an administrative and legislative, not judicial, matter" was rejected by the courts.³² His suggestion that "due process of law did not refer exclusively to judicial procedure" and, more importantly, that "due process could also be secured for administrative agencies without violating the Constitution,"³³ did not move the Congress to enact amendments necessary to make the Commission effective. Congress left the Commission clearly dependent upon the courts. As the Commission's orders were effective only if obeyed voluntarily, its proceedings became little more than "preliminary hearings, the real contest taking place in the Courts."³⁴

Two Supreme Court decisions in 1897 decimated what remained of the Commission's limited authority. Although the Commission's ability to regulate the railroads previous to 1897 was characterized as nominal, the Supreme Court's decisions in the *Interstate Commerce Commission v. Alabama Midland Railroad Co.*³⁵ and the *Maximum Rate Case*³⁶ reduced the Commission to little more than an advisory body.³⁷

In *Alabama Midland Railroad Co.*, the court determined that there were indeed circumstances under which more could be charged for the short haul than the long haul and that the Commission did not have the power to forbid these practices pending its review of the facts.³⁸ The

²⁹ Bernstein writes that under Cooley's leadership the Commission " * * * regarded itself as a tribunal for the adjudication of disputes between private parties, rather than an aggressive promoter of the public interest in railroad transportation." Bernstein *supra* note 20, at 29.

³⁰ *Id.* Bernstein adds, however, that the Commission "failed to develop techniques required for administering novel, experimental, and complex regulatory policies."

³¹ Ari and Olive Hoogenboom, *A History of the ICC*, at 30 (1976).

³² *Id.*

³³ Bernstein *supra* note 20 at 35.

³⁴ Schwartz, *supra* note 17, at 593.

³⁵ 168 U.S. 144 (1897).

³⁶ 167 U.S. 479 (1897).

³⁷ Schwartz *supra* note 17 at 593.

³⁸ The seriousness of the Court's actions to restrict the Commission's power was expressed by Justice John Marshall Harlan in 1887. Justice Harlan, believing that the court's decision in the *Interstate Commerce Commission v. Alabama Midland Railroad Co.*, was contrary to the will of Congress in creating the Commission, wrote in his dissenting opinion: "Taken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision, it seems to me, goes far to make the Commission a useless body for all practical purposes, and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to the Interstate Commerce Commission. The Commission was established to protect the public against the improper practices of transportation companies engaged in commerce along the several States. It has been left, it is true, with power to make reports, and to issue protests. But it has been shorn by judicial interpretation, of authority to do anything of an effective character." *Interstate Commerce Commission v. Alabama Midland Railroad Co.*, 168 U.S. 144 (1897) cited in Schwartz *supra* note 17 at 589-590.

court held also that decisions made by the Commission were not binding on the courts and that the courts could consider information not supplied the Commission. The court's decision "virtually emasculated the long-short haul clause" of the 1887 Act.³⁹

In the *Maximum Rate Case*, the Commission's power to fix rates was challenged. Justice Brewer, writing for the court in 1897 declared:

There is nothing in the Act fixing rates. Congress did not attempt to exercise that power, and if we examine the legislative history of the day, it is apparent that there was no serious thought of doing so * * *. The grant of such power is never to be implied * * *. It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act * * *. The power given (to the Commission) is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative * * *.⁴⁰

The Court's decision precluded the Commission from setting rates or functioning as a policymaking body. Further, it challenged the Congress to define more clearly the powers of this regulatory commission.

(c) *The Hepburn Act*.—Congress met this challenge in 1906 when it enacted the Hepburn Act, strengthening the Commission's regulatory powers and affirming that the Commission did indeed have important "quasi-legislative" as well as "quasi-judicial" and administrative responsibilities.

Under that Act:

1. The ICC was expressly given authority to prescribe maximum rates for the future;
2. The commission's orders were to be effective immediately and to remain so unless set aside by the courts;
3. The ICC was given the express power to issue reparation orders;
4. The scope of the Interstate Commerce Act was extended to include express companies, sleeping car companies, and pipe line companies transporting oil;
5. The so-called Commodities Clause was established prohibiting railroads from transporting commodities (other than timber) which they themselves produced or owned;
6. The ICC was enlarged from five to seven members, with higher salaries, and its power to obtain information was substantially increased.⁴¹

Professor Bernard Schwartz, an expert on the legislative history of the regulatory commissions, has written that, after the Hepburn Act extended the powers of the Commission, only the Commission's own inertia can explain its failure to vigorously enforce the Interstate Commerce Act.⁴²

The Hepburn Act opened a new era in the Commission's history.⁴³ From 1906 on, it was able to regulate the railroad industry directly.

³⁹ *Id.* at 579.

⁴⁰ *Maximum Rate Case*, cited in Schwartz *supra* note 17 at 580.

⁴¹ Schwartz *supra* note 17 at 594-595.

⁴² Schwartz states: "[The Hepburn Act] * * * endowed the Commission with the essential powers needed for effective regulation. If, even since the 1906 Act, the ICC has too often seemed ineffective in protecting the public interest, that has been due not to the lack of the necessary authority, but to the lack of will to use it effectively to restrain those being regulated in the public interest." Schwartz, *supra* note 17 at 594.

⁴³ *Id.* at 593. Additionally, Sharfman states that the Hepburn Act provided "for the first time a reasonably adequate basis * * * for effective government control of railroad transportation, and * * * endowed [the Commission] with authority to exercise a dominant influence in the system of regulation thus established." Quoted in Schwartz *supra* note 17 at 594.

As a result, the decade following the passage of this Act was "the peak of the Commission's power and prestige."⁴⁴

(d) *The Transportation Act of 1920*.—Fourteen years after the enactment of the Hepburn Act, the ICC's mandate shifted again with the enactment of the Transportation Act of 1920. The Act called upon the Commission to promote the establishment of a viable and efficient railroad system. The new powers granted the Commission closely reflected changes that had taken place in the Congress' perception of the "railroad problem" since 1906. Congress gave the Commission authority to fix minimum as well as maximum rates and made the Commission responsible for establishing rates which "would allow the railroads a fair return on investment."⁴⁵

This increase in responsibility was not without drawbacks. Professor Theodore Lowi asserts that after the Commission was authorized to set minimum rates, " * * * the ICC fell into a bargaining relation to rail and trucking companies that produced most of the deleterious effects now regularly identified by ICC critics."⁴⁶

The Commission was directed also to "approve consolidation of existing lines",⁴⁷ in an effort to insure satisfactory service and to develop a rational railway system plan. The plan was developed but never adopted. This assignment strengthened the Commission's planning authority and gave express recognition to planning as an essential element of regulation.

The 1920 Act's emphasis on promotion of the railroad industry signaled yet another trend in regulation: "anticompetitive rather than antimonopoly" mandates.⁴⁸ Many of the provisions in the 1920 Act were designed to insulate a faltering railroad industry from potential competition. The legislative designation of service rather than competition as an objective of regulation obliged the Commission and the regulated industry to share tasks with a common objective. The railroads cooperated with the Commission and often praised the Commission's regulatory efforts.

With the Commission acting both as collaborator in promoting and as adversary in regulating, internal conflicts and contradictions were unavoidable. In 1906, the Congress had directed the Commission vigorously to enforce laws which imposed severe penalties on railroads guilty of abusive monopolistic practices. In 1920, the Congress called upon the Commission to help the railroads to provide service, achieve

⁴⁴ Samuel P. Huntington, "The Marasmus of the ICC," 61 Yale L.J., 467, 471 (1952) (hereinafter cited as Huntington).

⁴⁵ 41 Stat. 474.

⁴⁶ Theodore J. Lowi, "The End of Liberalism," at 149 (1969) (hereinafter cited as Lowi).

⁴⁷ 41 Stat. 474.

⁴⁸ Roger Noll wrote about the 1920 Act: "The Transportation Act of 1920 was the first of a series of laws passed over the course of two decades that embodied an entirely new type of mandate. First, the laws were often distinctly anticompetition rather than antimonopoly. The power to set minimum rates and the duty to oversee the orderly development of an industry—the principal additions of the 1920 act to the ICC's responsibilities—have a distinctly different philosophy than did the maximum-rate regulation and the clear prohibition against the short-haul, long-haul rate differentials which were established in 1887. Second, the delegation of responsibility to the regulatory agency ceased being specific. No longer was the mandate simply to prevent certain reasonably well understood (if not well defined) practices. Agencies were now given very general, unspecified authority to manage an industry in the "public interest." The thrust of these two additions to the responsibilities of regulation was to make regulatory agencies a form of legal cartel for the regulated firms. Activities that would be clear violations of antitrust statutes if practiced by trade associations or informal meetings of industry executives were permitted and even condoned if overseen by regulators." Roger Noll, *Reforming Regulation*, pp. 37–38 (1971). See also Henry J. Friendly, *The Administrative Agencies* (1962), Bernstein *supra* note 20 and Lowi *supra* note 46.

financial stability, and improve efficiency. The Commission and the railroad industry had become partners in the delicate task of balancing regulation of the industry with its promotion.

3. *The truck problem*

As shippers turned more and more to trucks during the Depression and away from railroads which refused to lower their rates, a movement developed to extend the Commission's regulatory authority to motor carriers.⁴⁹ The Congress in the late 1920's and early 1930's became aware of numerous incidents of rate juggling, cut-throat competition, and defective service, as reported by shippers dependent on truckers. The railroad companies also urged the Congress to regulate the trucks. They complained that the trucking industry had a major competitive advantage in being unregulated. Further expansion of truck carriage, the railroads contended, would seriously threaten rail service.

In 1935, influenced by a desire to restrain freight rates for agricultural products,⁵⁰ Congress created limited regulation of the trucking industry with the enactment of the Motor Carrier Act of 1935.⁵¹

The Act divided the trucking industry into three classes of carriers: common, contract, and exempt.

It defined common carriers as those available to the public to carry all persons or goods. The Commission was directed to regulate these carriers by:

—requiring them to obtain certificates of convenience and necessity which specify the service to be rendered and the routes over which the carrier is authorized to operate.

—requiring that all rates must be reasonable and not discriminatory.⁵²

The Commission was also authorized to prescribe maximum, minimum, and actual rates for these carriers and was allowed to suspend rates for up to 7 months.

Contract carriers were defined as those offering specialized service for particular shippers and deal with only a few shippers. These carriers:

Must obtain a permit, providing that they are fit, willing and able to perform the contract service consistent with public interest and the national transportation policy.⁵³

The Act defined exempt carriers as those "hauling their owner's goods (private carriers); motor vehicles owned by railroads, water carriers or freight forwarders incidental to their business; local carriage; vehicles carrying fish, livestock, or agricultural commodities;

⁴⁹ Ann Friedlaender, *The Dilemma of Freight Transportation Regulation*, at 20 (1969) hereinafter cited as Friedlaender). Transportation economist, George W. Wilson observed: "The ostensible purpose of regulating trucking was to (a) enhance stability in the industry, (b) make its operating milieu more comparable to that of the railways in part to equalize competitive (i.e., regulatory) conditions, and (c) broaden the range of common carrier alternatives to shippers." Wilson in "Transportation Policy Options: A Political Economy of Regulatory Reform" edited by Allen R. Ferguson and Leonard Lee Lane (1976) at 20 (1976) (hereinafter cited as Ferguson).

⁵⁰ Friedlaender *supra* note 49 at 21.

⁵¹ 49 Stat. 543.

⁵² Staff Paper Prepared by the General Accounting Office in Hearings on the Interstate Commerce Commission Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Ser. No. 82 at 708. (1976) (hereinafter cited as GAO Report).

⁵³ *Id.*

trucks exclusively carrying newspapers, and trucks owned and operated by agricultural cooperatives."⁵⁴

4. *Transportation Act of 1940*.—Regulation of the trucking industry did not restore the railroads to health. By 1938, their financial condition had deteriorated to the point where President Franklin Roosevelt appointed two committees to undertake a comprehensive study of the railroad problem. Their reports formed the basis for the Transportation Act of 1940.⁵⁵

By 1940 the duties of the ICC had become so broad and confusing that the Congress thought it necessary to establish a national transportation policy. Its intent was to clarify the purpose of surface transportation regulation and to define the ICC mandate. The preamble to the Transportation Act of 1940 states:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provision of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.⁵⁶

The preamble is still cited by the Commission as justification for particular regulatory actions pursued.

Some supporters of the Commission claim that this broad statement has strengthened regulation by making it possible for the Commission to use its authority to take a wide range of enforcement actions. Others believe the statement has confused rather than clarified its mandate.⁵⁷

Professor Theodore J. Lowi writes:

* * * Congress in the Transportation Act of 1940 created as many contradictions as were dissipated * * *⁵⁸

One of the other major provisions of the 1940 Act "relieved [the Commission] of its duty [under the 1920 Act] to promulgate a national consolidation plan, and the power to instigate mergers and consolidations was left completely in the hands of the carriers."⁵⁹

The 1940 Act also extended Commission authority to the regulation of water carriers, in a further attempt to improve the competitive position of the railroads, although few water carriers were actually

⁵⁴ *Id.*

⁵⁵ National Transportation Policy, S. Rept. No. 445, 87th Cong., 1st Sess., Vol. 10 at 241 (1961).

⁵⁶ 49 U.S.C. § 1.

⁵⁷ Some students of regulatory law see the 1940 Act as a prime example of Judge Henry J. Friendly's criticism that in the area of regulation Congress has often created problematic, too broadly drawn law. Friendly writes: "The Statutes from which they [the regulatory agencies] derive their authority are so often couched in broad general terms as to endow them with a discretion so wide that they can offer a more or less plausible explanation for any conclusion they choose to reach with respect to many, perhaps the great majority, of matters coming before them."

Henry J. Friendly, *The Federal Administrative Agencies* (1962) at 129.

⁵⁸ Lowi, *supra* note 46 at 151.

⁵⁹ National Transportation Policy, *supra* note 55 at 241 (1961).

affected because of previously established exemptions in the Interstate Commerce Act.⁶⁰

5. *The Transportation Act of 1958.*—The Transportation Act of 1958,⁶¹ another Congressional attempt to save the railroads from impending financial disaster, also tried to direct the Commission's interpretation of the Transportation Act of 1940. One student of regulation wrote about the 1958 Act that:

* * * following still another 18 years (after the 1940 Transportation Act) in which the Commission made decisions 'without reference to any * * * general objective,' Congress in the Transportation Act of 1958 gave back to the Commission with one hand the ambiguities it had tried to remove with the other.⁶²

The Act provided guaranteed loans to the ailing railroads and once again attempted to improve their competitive position in the face of a continuing loss of traffic to motor carriers.

6. *Railroad legislation of the 1960s and 1970s.*—During the 1960s and 1970s some regulatory functions were removed from the Commission in the area of rail regulation. It did retain authority to study and assist in the reorganization of the ailing rail system. Direct responsibility for carrying out the reorganization, however, was entrusted to other government agencies.

Most Northeast roads, with two notable exceptions, had been in serious trouble for many years. When finally they went into bankruptcy, Congress acted to assure service and to restore service on some discontinued lines. Congress sought to save some intercity passenger train service through the 1970 Passenger Service Act,⁶³ creating a fully independent quasi-governmental company, National Railroad Passenger Corporation (AMTRAK) to take over bankrupt rail passenger transportation lines. This Act also made the Commission responsible for establishing and enforcing standards of adequate service by railroads operating intercity passenger trains. The Commission was directed to report annually to the Congress and the President on the effectiveness of the Passenger Service Act.

The Regional Rail Reorganization Act of 1973⁶⁴ was the government's most determined effort to keep the railroads in service and, among other things, "restore, support and maintain modern, efficient rail service in the Northeast region of the United States; to designate a system of essential rail lines in the northeastern region; to provide financial assistance to certain rail carriers."⁶⁵

It created the United States Railway Association and established another quasi-governmental corporation, Consolidated Rail Corporation (Conrail) to take over selected northeastern and midwestern railroads upon completion of the final system plan. The Act directed the United States Railway Association to develop a final plan to reorganize the railroads of the northeastern-midwestern regions. The Commission was directed to establish a Rail Services Planning Office to evaluate and assist in preparation of the plan.

7. *Railroad Revitalization and Regulatory Reform Act of 1976.*—The latest Congressional effort to clarify the Commission's public pro-

⁶⁰ GAO Report *supra* note 52 at 709.

⁶¹ 72 Stat. 568.

⁶² Lowl, *supra* note 46, at 151.

⁶³ 84 Stat. 1328.

⁶⁴ 87 Stat. 984.

⁶⁵ S. Rep. No. 66, 93rd Cong., 1st Sess., 1 (1973).

tection mission and redirect regulation of the railroads is contained in the recently passed Railroad Revitalization and Regulatory Reform Act of 1976. [RRRRA] ⁶⁶ The Act calls for the "elimination of needless or harmful regulatory constraints on railroads, and prescribes ratemaking practices which will encourage effective competition and protect consumers."⁶⁷

The Act calls upon the Commission to promote a more flexible rate structure for railroads, and to modernize the rate bureaus. Moreover, the Act establishes that it is the policy of the Congress to:

- (1) Balance the needs of carriers, shippers, and the public;
- (2) Foster competition among all carriers by railroad and other modes of transportation, to promote more adequate and efficient transportation services, and to increase the attractiveness of investing in railroads and rail-service-related enterprises;
- (3) Permit railroads greater freedom to raise or lower rates for rail services in competitive markets;
- (4) Promote the establishment of railroad rate structures which are more sensitive to changes in the level of seasonal, regional, and shipper demand;
- (5) Promote separate pricing of distinct rail and rail-related services;
- (6) Formulate standards and guidelines for determining adequate revenue levels for railroads; and
- (7) Modernize and clarify the functions of railroad rate bureaus.⁶⁸

The Act also contains provisions designed to make the Interstate Commerce Commission more responsive to the public and the needs of the shipping and transportation community. Title III of the Act contains provisions to reform and improve the Commission's regulation of the railroads.⁶⁹

8. Summary of legislative mandate.—Since 1887, Congress has charged the Interstate Commerce Commission with a series of regulatory responsibilities which have made its mission broad and complex.

Regulation of the railroads in the Commission's early days, was tantamount to regulating national economic development. Harassed by the railroads and hounded by the courts, the Commission was almost powerless until 1906. After 1906, the Commission became the dominant factor in railroad regulation and one of the most powerful agencies in government. Until the late twenties, the Commission was respected and highly visible. As the Commission grew older, however, its prestige decreased though its responsibilities increased.⁷⁰ By

⁶⁶ 90 Stat. 31.

⁶⁷ H.R. Rep. No. 94-781, 94th Cong., 2d Sess., 134 (1976.)

⁶⁸ P.L. No. 94-210.

⁶⁹ Title III contains provisions which required the Commission to (1) provide promptly documents related to railroad regulation to appropriate House and Senate Committees upon request, 49 U.S.C. 17 as amended; (2) cut delay in the issuance of the orders of the Commission, 49 U.S.C. 15(2) as amended; (3) streamline Commission hearing and appellate procedure, 49 U.S.C. 17 as amended; (4) establish a permanent Office of Rail Public Counsel, Pub. L. No. 94-210 Sec. 304; (5) reform the Rules of Practice before the Commission, Pub. L. 94-210 Sec. 305; (6) prohibit discriminatory tax treatment of transportation property, 49 U.S.C. et seq. as amended; (7) develop a uniform cost and revenue accounting system, 49 U.S.C. 20(3) as amended; (8) extend protection of securities laws to transportation stockholders, 15 U.S.C. 77(c) (6) as amended; (9) make the Rail Services Planning Office permanent, 45 U.S.C. 715 as amended; (10) ensure equitable distribution of cars for unit train service, 49 U.S.C. 1(12) as amended; (11) concurrently submit budgets to the Congress and the Executive, 81 U.S.C. 11 as amended; and (12) conduct a modernization and revision of the Interstate Commerce Act, Pub. L. 94-210 Sec. 312.

⁷⁰ Huntington, *supra* note 44 at 468-9.

the 1930s, the Commission was no longer an enemy of the railroads but a friend, and by the late 1950s, regulated truckers also were strong supporters of the Commission.

In recent years, some of the Commission's responsibilities have been removed. The act creating the Department of Transportation in 1967, for example, was an attempt to coordinate national transportation policy and encourage planning, as these functions had not been performed adequately by the Commission. From the Commission's perspective, however, the Act did little more than remove its authority over carrier safety.

In 1973, when the Congress was attempting to reorganize the collapsed Northeast railroad system, it gave the Commission only a supporting role. The Commission was not asked to produce the plan to reorganize the rail system, although the Congress did, create within the Commission the Rail Services Planning Office (RSPO) to:

1. Provide for public participation throughout the reorganization process.

2. Make its own analysis of two of the major documents required under the statutory scheme: the Report of the Secretary of Transportation on "Rail Service in the Midwest and Northeast Region" (the DOT Report), and the Preliminary System Plan issued on February 26, 1975, by the United States Railway Association (USRA).⁷¹

The central planning for the reorganization of the railroads was carried out by two other agencies, the Department of Transportation; and a new independent agency, the United States Railway Association.

9. *The Commission's mandate today.*—With more than 150 amendments to the Interstate Commerce Act now on the books⁷² a clear and concrete definition of the Commission's public protection mission has not been forthcoming.

The Commission at the Subcommittee's February 23, 1976, hearing offered the following:

... the Commission's public protection mission is to ensure that all shippers and communities—large and small, urban and rural—have available to them an adequate level of transportation service offered at reasonable, nondiscriminatory rates. Moreover, the maintenance of this system must be consistent with other major national goals such as energy conservation and environmental protection.⁷³

In a recently published booklet entitled "A Look at the Interstate Commerce Commission in the Bicentennial Year", the Commission explains that regulation is "needed today for dual reasons":

1. To provide industry stability so that shippers and the general public can have a dependable transport system.

2. To provide consumer protection that is more practical than court litigation.⁷⁴

Critics of the Commission assert that its emphasis on industry stability has discouraged competition, encouraged economic inefficiency,

⁷¹ Rail Services Planning Office Evaluation of the U.S. Railway Association's Preliminary System Plan, ICC, Washington, D.C., at 1, April 28, 1975.

⁷² Response to Subcommittee's June 1975 questionnaire, question 2.

⁷³ Hearings on the Interstate Commerce Commission Before the Subcomm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Ser. No. 82, at 10 (hereinafter cited as Hearings).

⁷⁴ A Look at the Interstate Commerce Commission in the Bicentennial Year, Interstate Commerce Commission, at 19 (1976) (hereinafter cited as A Look at the ICC).

and cost the American public billions of dollars.⁷⁸ The Commission's interpretation of its mandate, they charge, stifles innovation and insulates the status quo from competitive market forces. These critics suggest that many of the Commission's economic regulatory functions should be eliminated.

Two factors explain the lack of clarity in the Commission's mission. First, during the 89 year history of the Commission, the Congress has amended and extended the Commission's mission to include new social, political and economic goals based on its current perception of the surface transportation problem. At the same time, Congress has not removed past directives. Second, the Congress has assigned to the Commission responsibility for difficult decisions on issues the Congress chose not to assess in the turbulence of the political arena. In doing so, it never told the Commission "how" to solve the issues but wrote general instructions to enforce the law in such a way as to guarantee the "public convenience and necessity." The effect was to transfer conflicts among contending interests from the Congress to the Commission.

⁷⁸ See Thomas Gale Moore, "Deregulating Surface Freight Transportation," in Almarin Phillips, ed., "Promoting Competition in Regulated Markets," 1975. Moore estimates that domestic surface transportation regulation costs the American public \$4 to \$9 billion annually. George Wilson observed:

"From the beginning the Commission has interpreted its mandate mainly in terms of the preservation and protection of "common" carriage by truck and under this interpretation has logically sought to restrict contract private and exempt carriage—often with ludicrous results. The attempt to protect common carriage has also led the Commission to seek more and more authority and restrictions upon other forms of transport"

"In short economic regulation as implemented by the ICC has encouraged the growth of private and exempt truck carriage to the detriment of both rail and truck common carriage. Since the original purposes of the motor carriage regulation appear to have been generally accomplished, and since the circumstances within both the trucking industry and the general economy have changed radically, the continuing need for the kinds of regulation that seemed to make sense in the early 1930's is open to considerable question. Indeed, in the alternative environments, it may well be the case that perpetuation of the former patterns of regulation will have increasingly unfavorable effects which were originally unanticipated and unintended."

Ferguson, *supra* note 49 at 20-21. Ferguson and Lane further question the need for most economic regulation. They observe that: " . . . the available evidence suggests that the social benefits of regulatory cross subsidies are largely mythical"

"Any case based on these benefits of regulation is, upon even superficial examination, extremely weak. First, there is no evidence of large, systematic cross subsidies, and analysis suggests fallacies in the theory of cross subsidization. Second, the cross subsidy theory assumes that transportation costs are more important to the economics of small planes than is in fact the case. Third, the regulatory agencies are institutionally incapable of determining the correct extent and direction of cross subsidization. Fourth, the alleged pattern of cross subsidy does not seem, in fact, to be wholly consistent with the national interest. Fifth, a direct subsidy would be both more equitable and more efficient even if the need for some kind of subsidy were granted. . . ."

"These weaknesses might be less destructive if the policy guidelines in the agencies' legislative mandates were more adequate. Instead, they are incoherent catalogues of contradictory platitudes. The failure of direction from the legislature has been exacerbated by the nearly total absence of the effective congressional oversight. The net result has been the equivalent of a blank check to regulatory bodies whose interests and viewpoints are very close to those of the regulated industries"

"The cross subsidy argument does not appear to represent a valid objection against curtailing the power of the ICC. Cross subsidies do not appear to accomplish much, and what they do probably no longer enjoys widespread political support. Most important, though, is that other far cheaper mechanisms can be found to "buy out" any local interests actually benefiting from cross subsidies. The political task will not be overcoming resistance from the actual beneficiaries, rather it will be dispelling the widespread illusion among politicians that the income transfers are much more extensive than they are." Ferguson, *supra* note 49, at 177-78 and 185.

See, also, Ann F. Friedlaender, *supra* note 49, Chapter 4, and Friedlaender "The Special Costs of Regulating the Railroads" The American Economic Review; Papers and Proceedings, May 1971; George W. Wilson, "Transportation and Price Stability," The American Economic Review; Papers and Proceedings, May 1969; James Sloss, "Regulation of Motor Freight Transportation: A Quantitative Evaluation of Policy," B.J.E.M.S., Autumn, 1970; Larry Darby, An Evaluation of Federal Regulation of Common Motor Carriage, unpublished Ph. D. Dissertation, Indiana University, October, 1969; Robert W. Harbeson, "Toward Better Resource Allocation in Transport," The Journal of Law and Economics, October, 1969, pp. 321-338; and T. G. Moore, "The Feasibility of Deregulating Surface Freight Transportation" in Surface Transportation Legislation: Hearings Before the Subcommittee on Surface Transportation of the Comm. on Commerce, U.S. Senate, 92d Cong., 2d Sess., May 12 and 19, 1972, pp. 1082-1100.

Few have proposed the means to assure that the responsibilities given the Commission are harmonized in one organizational regulatory structure. Moreover, little has been done to reassess the continuing need for sections of the Interstate Commerce Act which economists have suggested are unnecessary and in some cases costly.

In President Kennedy's words, the history of the ICC shows that government regulation of transportation has been "A chaotic patchwork of inconsistent and often obsolete legislation and regulation," which developed as a result of "* * * a history of specific actions addressed to specific problems of specific industries at specific times."⁷⁶ Section 312 of the Railroad Revitalization and Regulatory Reform Act of 1976 directs the Commission to "* * * cause to be prepared, in whole or in part by consultants, a proposed modernization and revision of the Interstate Commerce Act, and a proposed codification of all Acts supplementary to the Interstate Commerce Act."⁷⁷ This can be the most constructive step toward clarifying the Commission's mission ever attempted. If the Commission or some other body charged with regulating surface transportation is to succeed its mission must be more clearly defined and periodically reviewed to incorporate new national goals and eliminate outdated and costly regulation. The future of the Commission therefore may depend on its execution of the above section of the law. Upon completion of this modernization and recodification process which should include codification of the Commission's own cases, the Congress must act swiftly to insure that the Commission or any other body charged with regulation of surface transportation clearly understands both the "why" and "how" of regulation.

III. Implementation of Mandate

Procedures of the Interstate Commerce Commission may be formal or informal; its actions prospective or retrospective. As noted above, the scope of the Commission's regulation is broad; its organization is cumbersome; its workload heavy; and the time taken to complete the regulatory actions prolonged.

A. THE SCOPE OF THE ICC'S REGULATION

The Commission regulates all forms of surface transportation including railroads, trucks, barges, oil pipelines, freight forwarders, transportation brokers and express agencies. The Commission, however, does not regulate agricultural commodity shipping, bulk commodity shipping, or private carriers.⁷⁸ The firms regulated by the Commission number at least 17,000 with total operating revenues of more than \$40 billion.⁷⁹ Since 1960, total operating revenues of the regu-

⁷⁶ Special Message to Congress on Transportation, April 5, 1962, in Public Papers of the President at 293.

⁷⁷ Pub. L. No. 94-210, Sec. 312.

⁷⁸ GAO Report *supra* note 52 at 669-670.

⁷⁹ ICC figures for calendar year 1973. In response to the Subcommittee's June 1975 questionnaire, question 3.

lated industry have continued to increase, though the number of firms regulated has continued to decrease.

Because of the evolution of the law, it is estimated that the Commission regulates 100 percent of the railroads, 50 to 60 percent of the motor carriers, and only 10 percent of the water carriers.⁸⁰

Table 1 presents data on volume of business of industry regulated for calendar years 1960, 1965, 1970 and 1973.

TABLE 1.—VOLUME OF BUSINESS OF INDUSTRY REGULATED BY ICC, 1960, 1965, 1970 AND 1973

Year	Number of companies (a)	Intercity ton-miles, ICC regulated (billions) (b)	Number of employees (c)	Net investment plus working capital (millions) (d)	Net income industry average (millions) (e)	Total operating revenue (millions) (f)
1960.....	19,603	945.8	1,354,265	\$31,588	\$733	\$18,018
1965.....	18,168	1,172.3	1,241,728	32,123	1,415	22,657
1970.....	17,542	1,346.1	1,258,581	37,140	709	29,865
1973.....	17,076	1,549.5	1,318,371	39,176	1,496	40,425

For all regulated carriers, the Commission is responsible for: approving or denying maximum, minimum or exact rates; controlling entry into service through permits or requirements for certificates of public convenience and necessity; controlling abandonment of service; controlling mergers; and controlling certain financial transactions.⁸¹

B. ORGANIZATION

The Commission is composed of 11 members, appointed by the President and confirmed by the Senate.⁸² The Chairman serves at the President's pleasure.⁸³ The Commissioners serve staggered 7-year terms. One is elected annually by the members of the Commission to serve as Vice Chairman. Each Commissioner, with the exception of the Chairman, is assigned to one of the Commission's three working divisions: Operating Rights (Division I), Rates and Practices (Division II), and Finance and Service (Division III). Each Commissioner has his own personal staff. (See Figure 1.)

The Commission staff is organized into five major bureaus: Enforcement, Operations, Traffic, Accounts, and Economics. The remainder of the Washington staff is divided among the offices of Proceedings, General Counsel, Secretary, Hearings, the Office of the Managing

⁸⁰ GAO Report *supra* note 52 at 670.

⁸¹ *Id.* at 669.

⁸² The number of Commissioners serving has increased from five in 1887 to the present 11. Originally there were just five Commissioners, 24 Stat. 383; in 1906 the number was enlarged to seven, 49 Stat. 595; in 1917 the number was enlarged to nine, 49 Stat. 270; and, in 1920 it was finally enlarged to 11, 49 Stat. 497.

⁸³ 49 U.S.C. 11, Reorg. Plan No. 1 of 1969 1 (1970).

Director, and the Rail Services Planning Office.⁸⁴ In each Regional Office, a Regional Auditor reports to the Bureau of Accounts; a Regional Counsel reports to the Bureau of Enforcement; and a Regional Manager reports to the Managing Director. Each of these individuals has general supervisory powers over Regional Office staff.

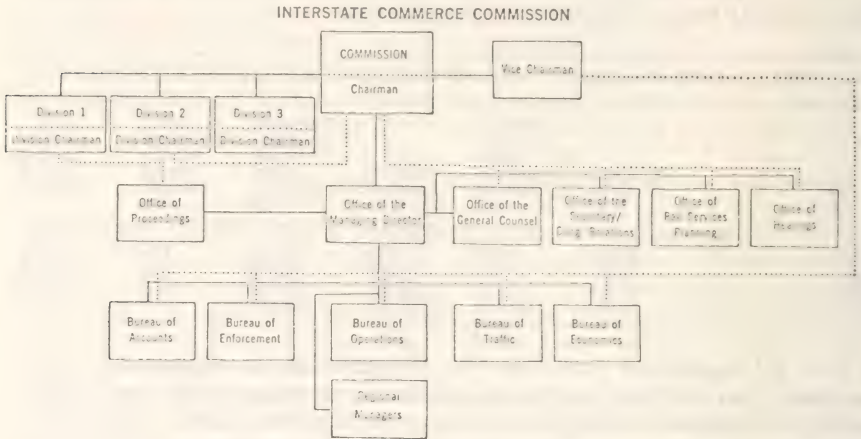


FIGURE 1.—ORGANIZATION CHART

C. WORKLOAD AND AVERAGE TIME NEEDED TO COMPLETE SELECTED PROCEEDINGS

The Commission's workload has continued to increase while its ability to dispose of cases in a timely fashion has declined.⁸⁵ The number of formal cases opened and closed for fiscal years 1968, 1970, and 1975 indicate that the Commission had more cases pending at the beginning of the year, opened more cases, closed more cases and had

⁸⁴ "Bureau of Enforcement—the agency's prosecutor, charged with enforcing civil and penal provisions of the Act and related statutes. The Bureau also takes part in specific ICC proceedings, to assist in developing facts and issues in the public interest."

"Bureau of Operations—maintains close liaison with the activities of railroads, motor carriers, water carriers, freight forwarders and rate bureaus to ensure that these industries operate in compliance with ICC policies."

"Bureau of Traffic—is concerned with the publication, filing and interpretation of tariffs, and their suspension before they become effective if they appear unreasonable or unlawful."

"Bureau of Accounts—is concerned with the accounting phases of effective economic regulation—prescribing uniform accounting rules, auditing carriers' books and reviewing financial reports."

"Bureau of Economics—performs transportation research and conducts economic and statistical analyses relating to regulation and to specific proceedings before the agency."

"Office of Proceedings—processes formal cases pertaining to operating rights, financial matters, rates and competitive practices."

"Office of the General Counsel—defends Commission orders if challenged in court. As 'house counsel' the General Counsel also renders legal opinions to the Commission."

"Office of the Secretary/Congressional Relations—the issuance and documentation center of the ICC. The Secretary is custodian of the Commission's seal and records and is responsible for issuing ICC decisions and orders."

"Office of Hearings—staff of Administrative Law Judges responsible for conducting Commission hearings."

"Office of the Managing Director—directs Commission activities in respect to money, manpower, materials and methods."

"Rail Services Planning Office—was created to assure that the public interest was represented in the restructuring of railroads in the Northeast. It now provides long-range planning support for the Commission." A look at the ICC, *Supra* note 74, at 18-20.

⁸⁵ Information supplied the Subcommittee by the ICC in response to Subcommittee June 1975 questionnaire.

pending more cases at the end of the year in 1975 than in either 1968 or 1970.⁸⁶

Moreover, the average time for disposition of selected cases has increased in all but one category between fiscal years 1971 and 1975. The Commission explains that this increase is owing to its success in resolving "many older proceedings." During Fiscal Year 1975, 8,315 proceedings were closed, 424 more than the 7,891 closed the previous year. Because so many long-standing cases were closed in Fiscal Year 1975, the Commission explains, the average time from initiation to closing increased. The average age of the cases pending was reduced, from 12.1 months on June 30, 1974, to 9.7 months on June 30, 1975.⁸⁷

D. COMPLIANCE

In order to carry out its law enforcement responsibilities the Interstate Commerce Commission employs both formal and informal methods.

Formal administrative proceedings include: rulemaking; review of fitness; review of applications; and investigations, sometimes leading to cease and desist orders.^{88a}

The Commission "makes referrals to the Department of Justice for the filing of criminal prosecutions, suits for forfeitures, and certain civil injunctive suits."⁸⁸

Civil claims settlements occur when "The Director of the Bureau of Enforcement is authorized, within the framework of the Federal Claims Collection Act of 1906, to settle enforcement claims arising under the civil penalty or forfeiture provisions of the Interstate Commerce Act, Elkins Act, and other amendatory and supplemental legislation."⁸⁹

In all major categories, the total penalties imposed on carriers in violation was larger in fiscal year 1970 than in fiscal year 1975. The total number of fines or forfeitures in all major regulated fields was also higher in 1970. (Table 2.)

TABLE 2.—NUMBER AND DOLLAR VALUE OF ICC FINES AND SETTLEMENTS, BY CARRIER, 1970-75

	Rail		Motor, water, and forwarder		Total	
	Fiscal year 1970	Fiscal year 1975	Fiscal year 1970	Fiscal year 1975	Fiscal year 1970	Fiscal year 1975
Cases concluded in court.....	14	9	248	200	262	209
Amount imposed.....	255,105	116,000	359,498	90,450	614,703	206,450
Civil claims settlements.....	36	34	385	334	421	368
Amount imposed.....	966,165	885,878	561,667	641,855	1,527,832	1,528,733
Total fines and forfeitures.....	50	43	633	534	683	577
Total amount imposed.....	1,221,270	1,002,878	921,165	732,305	2,142,435	1,735,183

Source: ICC.

⁸⁶ S2d, S4th and S9th Annual Reports of the Interstate Commerce Commission.

⁸⁷ Information supplied the Subcommittee by the ICC updating the Commission response to the Subcommittee's June 1975 questionnaire.

^{88a} Hearings, *supra* note 73, at 40.

⁸⁸ *Id.*

⁸⁹ *Id.* at 39.

IV. Case Studies

A. THE ENFORCEMENT PROGRAM

The Interstate Commerce Commission is charged with administering and enforcing the Interstate Commerce Act "with a view to carry out" the national transportation policy. The Act directs the Commission to provide "fair and impartial regulation of all modes . . ." designed to "recognize and preserve the inherent advantages of each."⁹⁰ It also calls upon the Commission to ensure that service is provided at a "reasonable charge" and that "unjust discrimination, undue preferences or advantages, or unfair or distinctive competitive practices" are eliminated.

The Commission concentrates its enforcement efforts in its compliance program. It is largely carried out by the Bureaus of Enforcement and Operations, and mostly involves enforcing Commission rules and regulations.

The Subcommittee conducted a major review of the Commission's compliance program. The Subcommittee closely studied three internal reports and one external report which found major deficiencies in the administration of the compliance program. The deficiencies include lack of policy guidance and direction; concentration on economically insignificant cases; discrimination against small carriers; failure to impose penalties strong enough to deter future violations; and lack of coordination and inefficient utilization of resources.

1. *Lack of policy guidance and direction.*—The Commission has failed to provide its field staff with sufficient direction to enforce the "fair and impartial regulation of all modes" aspect of the national transportation policy. It has failed to issue policy directives which establish priorities for regulation based on the volume of traffic moved by each mode and the economic importance of each type of violation. Its enforcement activities have tended to concentrate on carriers threatening the status quo rather than to attack serious offenses which cause the greatest harm to the economy. The Commission's present guidelines, by stressing "equal priorities,"⁹¹ leave critical enforcement policy choices to lower level employees.

Three recent internal reports have cited this lack of guidance. In the first, dated July 1975, entitled "A Report About the Commission's Compliance Program" (hereinafter referred to as the Smith report),^{91a} a panel examined the Bureau of Operations and Bureau of Enforcement actions for fiscal year 1972 at the suggestion of Chairman George M. Stafford. It concluded that "despite allusions to Commission policy in writings of both Bureaus (Enforcement and Operations) . . . its presence seems amorphous and difficult to pin down." It recommended that "a more detailed, formalized pronouncement of Commission compliance objectives vis-a-vis its organic statutes and resources" was necessary in order to "provide greater program illumination and impact while at the same time, better shape and guide its course."⁹²

A second panel was asked to "review the Commission's organization, operations, and procedures as they relate to the compliance pro-

⁹⁰ 49 U.S.C. § 1.

⁹¹ ICC Bureau of Operations Field Staff Manual.

^{91a} A Report About the Compliance Program, Interstate Commerce Commission (1975) in Hearings, *supra* note 73, at 143-270.

⁹² *Id.* at 266-267.

gram." (hereinafter referred to as the Fitzwater report), the report of the Staff Study Panel on Regulatory Reform found a major policy vacuum on compliance.⁹³ The authors of the Fitzwater report, presented to the Commission in October 1975, stated that the compliance program "has no overall purpose", its policy "is reaction rather than action oriented." They quoted one employee as saying, the Commission operates "like a ship without a captain."⁹⁴

The Fitzwater report panel found that this lack of guidance was among the "basic weaknesses identified in earlier studies" and still remains uncorrected. The Fitzwater report concluded that the program suffered most from:

An almost total lack of central policy development and coordination with respect to the compliance program resulting in a de facto delegation of policy making to the investigator in the field.⁹⁵

A third report by the Interstate Commerce Commission Vice Chairman Charles Clapp (hereinafter referred to as the Vice Chairman's report), presented August 11, 1976, stated that "uncertain as to the Commission policy and sometimes receiving contradictory signals [field] managers may become increasingly reluctant to step out front with aggressive, positive programs of action."⁹⁶ The Vice Chairman's report concluded that "while there is criticism that certain people in managerial positions are too cautious in carrying out their responsibilities, there is recognition, too, that this may be attributable, in part at least, to our (the Commission's) own failure to provide a sense of direction."⁹⁷ The Vice Chairman's report, conducted to review the findings and recommendations in the Smith and Fitzwater reports, further concluded that "the Commission should exercise a more active role in developing policy in the compliance area."⁹⁸

Lack of Commission guidance has left it up to investigators in the field to "decide * * * who, what, when, and where"⁹⁹ to investigate. Any relation between the choices made by these investigators and the Commission's thinking on what emphasis should be placed on enforcement activities necessary to carry out the national transportation policy is purely coincidental.

2. *Concentration on economically insignificant cases.*—The Commission's compliance staff, directed to enforce the Interstate Commerce Act with even-handedness or "a balanced approach," has tended to concentrate on economically insignificant cases, especially unauthorized motor carrier violations. Concentration on such petty offenses has resulted from an undue emphasis on the number of violations reported and processed. This emphasis on "numbers" has distracted the staff from its responsibility to pursue the major offenders. The Commission admits that its staff must focus on eliminating significant violations. Nevertheless, the Fitzwater report's authors found that although such violations do exist in quantity "the enforcement effort * * * is simply not directed toward developing them * * *." The panel

⁹³ Report on the Commission's Compliance Program by the Staff Study Panel on Regulatory Reform, October 1975, in Hearings, *supra* note 73, at 83-139.

⁹⁴ *Id.* at 100-101.

⁹⁵ *Id.* at 100.

⁹⁶ Report of the Vice Chairman to the Commission on the Compliance Program, August 11, 1976, at 3.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1.

⁹⁹ Hearings, *supra* note 73 at 100.

concluded that much of the Commission's compliance resources are expended on " * * * operating rights violations against extremely small motor carriers which have little economic impact." These violations "are easy to develop and are made to satisfy the requirements of the numbers game." At the same time, economically significant violations are left untouched since the "numbers game * * * precludes investigators from devoting the time necessary for their development."¹⁰⁰

The Smith report states that "Many cases seemed to have dubious regulatory value. Few, if any, concerned inadequate service to shippers—one of the five compliance priorities."¹⁰¹ The Smith report includes numerous examples of cases of questionable regulatory value. The following case is one of them.

An investigation began when a complaint was filed by an authorized motor carrier alleging that the respondent was serving a point 200 feet outside the 12-mile limit authorized by the Commission.¹⁰² The respondent's gross annual revenues were reportedly around \$63,000, placing it among the smallest companies regulated by the Commission.

As a result of the complaint, cartographers were asked to measure and remeasure the distance from the point of origin to the point in question. The Commission's investigative report stated that a U.S. Geological Survey cartographer in Missouri, using U.S. Geological Survey maps, had found the point in dispute to be 200 to 250 feet beyond the 12 mile limit. The investigative report stated that the cartographer believed, however, "that the maps could have been expanded at the time of measurement due to heat and *possibly* the distance may be 12 miles or less instead of more than 12 miles (by 200 or 250 feet)."¹⁰³

After thorough investigation, the Bureau decided that:

... pursuant to its interpretation of the concerned authority the boundary line is incorrect and such service is beyond the scope of the respondent's territorial authority. Consequently, the Bureau is of the view that an appropriate cease and desist order should be entered.¹⁰⁴

The respondent decided to fight the Commission's decision and the dispute was finally resolved not by Commission action but when the respondent purchased a piece of land which was then annexed by the town whose border was the base point of the measurements. By extending the town boundary, the distance to the point in dispute was brought clearly within the 12 mile limit.¹⁰⁵ After many weeks of investigation involving Washington and field personnel, the case was closed.

According to a draft General Accounting Office Report completed in the spring of 1975, the Commission's compliance program also prosecutes motor carrier violations to the neglect of rail violations.¹⁰⁶ This finding is significant since much more freight is moved by regulated interstate railroads than by interstate motor carriers.

¹⁰⁰ *Id.* at 111.

¹⁰¹ *Id.* at 221.

¹⁰² *Id.* at 223-229.

¹⁰³ *Id.* at 224.

¹⁰⁴ *Id.* at 229.

¹⁰⁵ *Id.* at 228.

¹⁰⁶ Draft General Accounting Office Report, Regulation of Rail and Motor Carriers, Compliance and Enforcement Need Improvement (1975) (hereinafter cited as Draft GAO Report).

Moreover, an internal Bureau memorandum also suggests that the compliance program is concentrating too much effort on insignificant cases. A memorandum from former Bureau of Operations Director, R. D. Pfahler, to the Chairman of the Commission dated December 1975 states:

... to this date the Bureau of Enforcement has failed to comply with our request to define the terms economic significance or impact. Although cases which we believe significant have "died on the vine" within the Bureau of Enforcement, such Bureau continues to forward routine matters to us for investigation such as unauthorized operations involving local transportation of sand.¹⁰⁷

The Vice Chairman's report declared that staff personnel found that one of the most serious deficiencies in the administration of the compliance program was its failure "to distinguish between the significant and the insignificant."¹⁰⁸ Since the majority of insignificant cases involve very small motor carriers, the program has concentrated on them.

3. Discrimination against small carriers

The Compliance program as it is now structured places its major emphasis on small carrier violations which are easy to develop. Reports on the compliance program show that it discriminates against "... small motor carriers, and against those carriers who keep good records."¹⁰⁹

The Smith report found that "many respondents seemed to be accorded inconsistent treatment."¹¹⁰ The report contains a number of cases in which large companies, including those with a record of previous violations, were granted more favorable treatment than small ones.¹¹¹ The Smith report states that:

*The percentage of those with gross revenues exceeding \$1 million who were dropped from prosecution for unauthorized transportation violations was 2½ times greater than for those with gross revenues of less than \$50,000 [emphasis added].*¹¹²

Of those with prior convictions under the Interstate Commerce Act, violators with gross revenues exceeding \$250,000 were relieved from prosecution in 94 percent of the cases, but only 4 percent of those with gross revenues below \$250,000 had their cases dropped. Only 23 percent of those with prior Interstate Commerce Act convictions had gross revenues of less than \$250,000. The 77 percent with gross revenues exceeding \$250,000, the large majority of repeat offenders, accounted for only a small percentage of the prosecutions.¹¹³

The Fitzwater report echoed the Smith report findings:

... the large majority of investigations conducted and cases concluded involve operating rights violations against extremely small motor carriers (less than \$300,000 annual revenues) which have little economic impact.¹¹⁴

Both the Smith and Fitzwater reports state that most of the violations investigated involve some type of unauthorized transportation, a violation typical of small carriers.

¹⁰⁷ Memorandum from Robert L. Rebein, Managing Director, to Chairman George Stafford, Subject: Compliance Study Materials, June 7, 1976, at 3.

¹⁰⁸ Vice Chairman's Report, *supra* note 96, at 3.

¹⁰⁹ Hearings, *supra* note 73, at 113.

¹¹⁰ *Id.* at 232.

¹¹¹ *Id.* at 232-44.

¹¹² *Id.* at 240.

¹¹³ *Id.* at 277-281, and 376-377.

¹¹⁴ *Id.* at 113.

The GAO report stated that equal treatment of violations in effect discriminated against small operators.

The Bureau of Enforcement's practices resulted in all motor carrier violators being treated alike—which tended to favor the more serious violator. Little distinction was made between chronic and less frequent violators and between repeat violators and first-offenders. In one extreme situation two motor carriers were each fined \$1,500, although field agents had discovered 17 violations by one and 2,000 violations by the other.¹¹⁵

The Vice Chairman's report concluded the staff believes the compliance effort has a:

* * * tendency to go after "the little guy" because it is easier, with the result that we tend to catch, in the words of one investigator, "the honest and the stupid"—the honest because he keeps basic records which demonstrate his violation and the stupid because he is too dumb to cover up.¹¹⁶

The Commission's compliance program has limited value because it concentrates on trivial cases. By devoting a majority of the staff's time and resources to relatively minor violations, it allows serious violations by large companies to prevail. Lack of guidance may be to blame at least partially but the resources of large companies may have enabled them to evade or resist enforcement. The Commission's investigators do not have comparable resources to deter serious and complicated violations. In this trial of relative strength, the Commission's compliance program has not succeeded in prosecuting major violations of the law.

4. *Failure to impose penalties strong enough to deter illegal activity.*—Penalties imposed and actions taken against violators of the Commission's rules and regulations have failed to prevent reoccurrence of violations. Monetary fines imposed by the Interstate Commerce Commission are considered by most carriers as simply a "cost of doing business."¹¹⁷ This fundamental weakness in the compliance program encourages rather than discourages violation of the law.

The Vice Chairman's report indicates that "crime does pay in areas of the Commission's jurisdiction since fines and penalties imposed against violators of our regulations do not cover the gain received from the illegal operations." The Vice Chairman observed further:

When we [the Commission] do move against a violator we do so in such a mild way that it amounts to little more than a slapping of the wrist.¹¹⁸

The Smith report supports this analysis, stating "most of the forfeitures and fines were substantially less than the illegal revenues received by violators and substantially below the \$500 per count statutory penalty authorized for most violators."¹¹⁹ Moreover, "over one fourth" of the documented violations were not prosecuted.¹²⁰

The GAO reported that out of the 106 average violations discovered per case only 19 were reported with evidence and only 14 ultimately were prosecuted.¹²¹ The average settlement was \$1,344 compared with average illegal revenues per case of \$5,304. "The amounts received in settlements were about 20 percent of the maximum fine of \$500

¹¹⁵ Draft GAO Report, *supra* note 106 at 2.

¹¹⁶ Vice Chairman's Report *supra* note 96 at 3.

¹¹⁷ *Id.* at 12.

¹¹⁸ *Id.* at 11-12.

¹¹⁹ Hearings, *supra* note 73 at 214.

¹²⁰ *Id.* at 213.

¹²¹ Draft GAO Report, *supra* note 106 at 21.

that could have been imposed for the violations prosecuted." The GAO concluded that:

The Bureau of Enforcement's practices resulted in all violators being treated alike—which tended to favor the more serious violator. Little distinction was made between chronic and less frequent violations or between repeat violators and first offenders.¹²²

Although strong action is necessary to deter repeat offenders, the Fitzwater report states that the Commission has "... no recognizable policy for dealing with repeat offenders, and often they receive more lenient fines than first time offenders."¹²³

The Interstate Commerce Commission has never revoked a motor carrier certificate since the passage of the Motor Carrier Act in 1935.¹²⁴ Refusal to take such action or to levy fines to the maximum renders the compliance program incapable of reducing illegal practices. According to Commission statistics, "of those prosecuted, 66% had a prior record of at least one similar violation."¹²⁵ Violators would rather break the law and pay a small fine knowing that their certificate will not be threatened than refrain from potentially profitable violations.

5. *Lack of coordination and inefficient utilization of resources.*—The Commission's compliance program fails to use its resources well and to coordinate fully field activities with headquarters. Decisions which could be made by the field staff are sent to Washington for action, an unnecessary delay at best. Attorneys in headquarters do not usually develop cases with the field investigator who gathered the evidence. This separation has led to further delay, confusion, duplication, and often ineffective prosecution.

The Vice Chairman's report found that failure to coordinate and unify the compliance program has led to waste of resources and staff confusion. The report states:

Perhaps the most common comment made to me in the course of my discussions was to the effect that one person should be in charge and my investigations led me to that conclusion.¹²⁶

The Vice Chairman concluded further that having three individuals in each regional office with "overall charge and with each reporting back to his own unit at headquarters creates a situation which is difficult at best and unlikely to be conducive to efficient and effective operation."¹²⁷

The Vice Chairman found also that not enough routine matters are delegated to the field. According to Commission personnel, "too much is handled in Washington and too little at the regional offices." The report found "statements are made that 90% or so of the cases or proposed action items that are forwarded to Washington are of a routine or nonpolicy nature which could be handled readily at the source, yet the Bureaus insist on second guessing field judgment with a resulting drain on enthusiasm and initiative."¹²⁸

¹²² *Id.* at 22.

¹²³ Hearings, *supra* note 73 at 194.

¹²⁴ Vice Chairman's Report, *supra* note 96 at e.

¹²⁵ Hearings, *supra* note 73 at 164.

¹²⁶ Vice Chairman's Report, *supra* note 96 at 4.

¹²⁷ *Id.*

¹²⁸ *Id.* at 3-4.

The Smith panel supports the Vice Chairman's findings, and states that "most of the principal recommendations of field attorneys were agreed to by headquarters staff to whom they reported."¹²⁹ The report states further that:

Recommendations of field attorneys concerning the nature of the violations to be charged and the type of enforcement action to be taken were agreed to by Washington reviewing attorneys 90 percent of the time and by the Director's Office 90 percent of the time.¹³⁰

The Smith panel concluded that these data clearly show that unnecessary "duplication of effort"¹³¹ is taking place. The Fitzwater panel concluded that there is:

Insufficient delegation to field level of authority to perform day-to-day functions and ineffective supervision and inefficient use of manpower and resources is due to headquarters involvement in day-to-day operations. * * *¹³²

The Fitzwater report contains numerous examples of conflicts between the Bureau of Enforcement and the Bureau of Operations "as to the type of case to be developed on the action taken as a result of the failure of these two bureaus to work closely together from the very beginning of each investigation."¹³³ These conflicts have slowed the enforcement process significantly.

6. Reorganization and redirection needed

In summary, the Subcommittee agrees with the Vice Chairman's analysis that:

The existing division of authority and responsibility over the program has resulted in ineffective management direction; insufficient coordination of activities, particularly in the field; inadequate enforcement measures against carriers in violation of regulations; and wasteful expenditures of resources in investigating relatively insignificant violations that are frequently not prosecuted.¹³⁴

The subcommittee supports the recommendations in the Vice Chairman's report that the ICC must totally reorganize and unify its compliance program. The Subcommittee agrees with the Vice Chairman's analysis that good personnel is essential to the success of a newly organized program, and that the Commission must place in the top decisionmaking positions staff capable of carrying out the new plan.

7. Delays in correcting the reported deficiencies.—Until recently, the Commission has refused to acknowledge reported deficiencies in the administration of its compliance program. When questioned by the Subcommittee staff on February 23, 1976, ICC Chairman George Stafford refused to confirm or deny the truth of these findings:

Mr. BROWN. As you know, Mr. Chairman, central to this Subcommittee's investigation and final report to the Congress on the need for regulatory reform is the careful examination of each agency's enforcement and compliance program. In developing the public record therefore, your reaction to specific findings and recommendations contained in this report is essential.

The panel found—and this is included in the Chairman's letter to you on January 26—that:

Our field interviews revealed wide agreement that significant tariff, Elkins Act, unlawful control, demurrage and detention, and Clayton Act violations exist

¹²⁹ Hearings, *supra* note 73 at 263.

¹³⁰ *Id.*

¹³¹ *Id.* at 147.

¹³² *Id.* at 100–102.

¹³³ *Id.* at 102.

¹³⁴ Vice Chairman's Report, *supra* note 96.

in quantity. The investigatory effort, however, is simply not directed toward developing them, and in many instances, the "numbers game" precludes investigators from devoting the time necessary for their development.

Further:

* * * the large majority of investigations conducted and cases concluded involve operating rights violations against extremely small motor carriers (less than \$300,000 annual revenues) which have little economic impact. Typically, they are easy to develop and are made to satisfy the requirements of the "numbers game."

And, more generally:

"Major areas of regulatory concern are virtually untouched by our enforcement program. Redirection is imperatively needed."

Chairman Stafford, do you have any reason to believe that the findings and conclusions I have just read to you are untrue?

MR. STAFFORD. No. I have no reason to believe they are untrue or true. I have asked the best people we have on staff level to make this study. Just let me make one little caveat there. I have no doubt that a majority of these cases dealt with the small carriers, as you called it, [of] \$300,000 and under, gross [revenues] [per] carrier. Part of this can come about by the fact that by far and large the greatest majority of carriers we have are in that category so there is some basis for percentage being in that way.¹³⁵

The following chronology of the action taken to date by the Commission to investigate and correct the reported deficiencies illustrates its failure to resolve these issues quickly.

The Commission began its most recent review of the compliance program in February 1974 with the formation of the panel that wrote the Smith report, which was completed and discussed in the summer of 1975. In June of 1975, Chairman Stafford asked a panel to conduct an additional study, which produced the Fitzwater report.

In July 1975, the Smith report was circulated to the affected bureaus and members of the Commission. The Commission reported that "informal discussions [were] held between affected parties aimed at identifying needed changes and strengthening [the] Commission's compliance program."¹³⁶

The Fitzwater report was transmitted to the Commission on October 8, 1975 and was reviewed by all affected parties. Bureau comments on both reports were received by the Commission in December 1975. In January 1976, the Commission considered the reports again, along with comments from affected bureaus. At this time, the Commission referred the matter to the Vice Chairman for resolution. Further bureau comments were received by the Vice Chairman in January. Thereafter, he began "his discussion with agency personnel, study of relevant materials, and interviews with field staff personnel during the March-April Regional and Headquarters Management Conference."¹³⁷

On January 26, 1976, Subcommittee Chairman Moss expressed his concern about the findings in the Fitzwater report and asked the Commission to present its "action program for 'program redirection,' the Fitzwater panel found to be 'imperatively needed.'"¹³⁸

When the Commission testified before the Subcommittee on February 23, 1976, it did not present an " * * * action program for 'pro-

¹³⁵ Hearings, *supra* note 73 at 275.

¹³⁶ *Id.* at 372.

¹³⁷ *Id.* at 373.

¹³⁸ *Id.* at 274.

gram redirection' * * * Chairman Stafford did, however, testify that he had " * * * asked the Vice Chairman and he thinks he can have a report before the Commission within the month ready for our action or for our consideration."¹³⁹ However, Chairman Stafford declined to comment on specific findings, conclusions, and recommendations found in either the Smith or Fitzwater reports. He merely observed that the " * * * Vice Chairman * * * within the next few weeks [will] be making a final report to the full Commission as to what his judgment is after having both sides sit before him" and "The Commission itself has not made a decision and will not until the Vice Chairman comes in with his report from all sources."¹⁴⁰

When questioned about the Fitzwater report at the Subcommittee's March 5, 1976 hearing, Chairman Stafford reported that no additional action had been taken by the Commission. Chairman Stafford also testified he had not finished examining the materials.

Mr. BROWN. You have had a chance to review both the Smith and Fitzwater reports. Is that correct?

Mr. STAFFORD. I have turned them over to my staff people to work on those and we have turned all of this over to the Vice Chairman. I am generally aware of most of it.

Mr. BROWN. Have you personally read these materials?

Mr. STAFFORD. I have not personally read all of it; no.

Mr. BROWN. Do you think it is worth your personal attention?

Mr. STAFFORD. Yes, sir, it is getting our personal attention. We are right on top of it. This is not the kind of decision you can sit down and say, "This is what we will do" when you are affecting some departments.

Mr. MOSS. Mr. Chairman, I must confess to being somewhat puzzled. I have read the reports in order to be prepared for these hearings. You say you have not read the reports? Are they important?

Mr. STAFFORD. I have not made it clear that the staff has been in to discuss this matter with me. We just have, as I am sure you do too, many reports before us every day.

Mr. MOSS. That is the thing that troubles me.

Mr. STAFFORD. And many votes every day.

Mr. MOSS. I have many reports. As you know, there is never a hearing that doesn't cause each Member to have a hearing folder of at least this size and where it touches so directly upon the internal organization and functions of the Commission, it would seem to me that this would be of sufficient significance to require not only a referral to staff, because I occasionally refer to staff for analysis and comment, but a personal reading as well, as I have done, in order to be prepared for the hearings we are having today, of which this is the second in the series.¹⁴¹

On March 29, 1976, Chairman Moss wrote to the Commission and once again asked that it supply "a timetable detailing its plan and methodology for reviewing the serious allegations in * * *" the Smith and Fitzwater reports.¹⁴² The Commission's April 9, 1976 reply stated that final changes in the organization structure of the Commission "if needed" could be expected in 4 to 6 months. The Commission reported that the Vice Chairman's recommendations were "expected to be submitted by the end of April 1976." On May 4, 1976, the Commission was scheduled to hold a conference on the matter.¹⁴³ Another Commission conference was held on May 18, 1976.

¹³⁹ *Id.* at 278.

¹⁴⁰ *Id.* at 280.

¹⁴¹ *Id.* at 373-374.

¹⁴² *Id.* at 379.

¹⁴³ *Id.* at 394.

Additional comments were to be received from the affected Bureaus within a few weeks after the May 18 conference. Another conference was then to be held at which, the Commission stated, "we expect to have formulated a position on the matter. * * *" ¹⁴⁴ None of the deadlines outlined in the Commission's April 9, 1976, letter were met.

Concerned that an expeditious review of the reports was not taking place and that a plan for action was not being developed, on May 25, 1976, the Subcommittee wrote the Commission to ask for the Vice Chairman's report, which was scheduled to be completed by the end of April.

The Commission's response on June 1, 1976 stated that the Vice Chairman had reported orally on May 13th but had not yet submitted his report in writing. The Commission informed the Subcommittee that "as soon as he [Vice Chairman] does so [completes a written report], a copy will be forwarded to the Subcommittee." ¹⁴⁵

The Commission met again on August 11, 1976, when the Vice Chairman's report was presented for consideration. A copy of the report was transmitted to this Subcommittee on the same day. The Commission later voted to approve a compromise plan based on the Vice Chairman's report designed to reorganize the compliance program.

Although the Commission agreed with most of the findings in the Vice Chairman's report, it did not accept fully the recommendations to create a completely unified compliance and enforcement program. The compromise arrived at retained the Bureau of Operations "as it now exists" except for its investigative functions which were transferred to the newly-created Bureau of Investigations and Enforcement.

Thus, the Bureau of Operations will retain the responsibility for carrying out inspections and service activities. The Vice Chairman's report argues, however, that combining the inspection and service activities with the enforcement and investigation activities is essential. This Subcommittee's own review of the compliance program is consistent with the Vice Chairman's conclusions.

8. *Conclusion.*—The Commission's compliance program has for many years been labeled inefficient, ineffective, discriminatory, and uncoordinated. ¹⁴⁶ Problems reported as long ago as 1952 remain unsolved.

As long ago as 1962, Commissioner Hutchinson wrote:

The field organization is the despair of all who have studied it. Going back to the Wolf Report in 1952, all the experts have recommended essentially the same type of realignment—a single field force under one manager (rather than five) organized into appropriate regions with responsibility for planning, coordinating,

¹⁴⁴ *Id.* at 395.

¹⁴⁵ Letter from George M. Stafford to Honorable John E. Moss, June 1, 1976, at 1.

¹⁴⁶ Reports on the ineffectiveness and unfair nature of the Commission compliance program are not new. As the Fitzwater Report points out some criticisms of the Commission's enforcement program which are still valid today were reported, in detail, some 24 years ago. The Wolf Management Engineering Company report, prepared for the Senate Committee on Interstate and Foreign Commerce in 1952 was the first report critical of the lack of coordination in the Commission's field operation. Other reports, listed below, recommended changes in the Commission's compliance organization to correct deficiencies which still exist. (1) Booz, Allen, and Hamilton Management Study, 1960. (2) Study by the Special Advisory Committee on Interstate Commerce Commission Practices and Procedures, 1960. (3) Managing Director's Field Reorganization Proposal of July 23, 1961. (4) Commissioner Hutchinson's Field Reorganization Proposal of May 31, 1962. (5) Policy and Planning Committee Project 1964. Headquarters Office and Bureau of Policy and Planning Committee Project 1966. Proposed Department of Transportation—Effect on Commission Organization. (7) Landis Report.

and executing Commission field programs. I am convinced that this approach is sound and I believe that perhaps a majority of the Commission holds this view.¹⁴⁷

The Commission has reorganized its compliance organization many times over the last 25 years; nevertheless, none of these changes have successfully eliminated the program's major problems. Although ambiguity in the Interstate Commerce Act may be partially to blame for the Commission's failure properly to structure its compliance program, the Commission has failed to provide its field organization with the necessary policy guidance and personal attention to achieve the most fair and efficient implementation of the Interstate Commerce Act. The Commission has placed emphasis on industry stability, discouraging competition and restricting entry. The Commission's full energies must be devoted to correcting this problem.

The Subcommittee agrees with the conclusion in the Smith Report that "* * * manuals on 'how' are no substitute for policies on 'what', 'why', and 'who'." The Subcommittee further agrees that "a more detailed, formalized pronouncement of Commission compliance objectives vis-a-vis its organic statutes and resources would provide greater program illumination and impact, while, at the same time, better shape and guide its course."¹⁴⁸ The Subcommittee concludes that correction of the problems identified in this section is critical to the proper administration of the Interstate Commerce Act. The Commission's proposal to create a new Bureau of Investigations and Enforcement does not go far enough. A conscientious response to the Vice Chairman's report as amended is essential. The Subcommittee will therefore continue to monitor closely the development of the Commission's new compliance policy and its efforts to eliminate the deficiencies discussed herein.

B. PUBLIC PARTICIPATION

Efforts to improve public access to the Interstate Commerce Commission have increased in the last few years. The Commission's approach to increasing public participation is unique. Since 1974, the Commission has had a Public Counsel's Office designed to assist citizens in presenting views before the Commission on railroad matters. On February 5, 1976, with the enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, this office was expanded and made independent of the Commission. This independent Office of Rail Public Counsel is a major experiment in citizen participation in the ICC decision-making processes. Since the independent Office of Rail Public Counsel and its precursor, the Office of Public Counsel, under the Rail Services Planning Office, are the first such Offices to be created on a Federal level, their performance and experience will strongly influence future efforts to protect public interests in the workings of other Federal regulatory bodies.

1. Rail Services Planning Office—Office of Public Counsel.—The Regional Rail Reorganization Act of 1973 was the largest industrial reorganization plan in history. The Act, designed to reorganize the bankrupt railroads of the northeastern and midwestern regions

¹⁴⁷ Hearings, *supra* note 73, at 137.

¹⁴⁸ *Id.* at 266-267.

of the Nation, called upon the Commission to establish a Rail Services Planning Office (RSPO) to assist in the reorganization effort.¹⁴⁹

The office was directed by the Congress to assure that the views of rail users were considered in the reorganization process.¹⁵⁰ To insure that the RSPO would have the resources to carry out this directive, the Office was authorized under the Act to employ attorneys and other consultants necessary to perform its task of providing users with technical and legal assistance.¹⁵¹ Congress did not elaborate in the statute itself, or in any of the committee reports accompanying the Act, on how the Commission should organize the employment or the services of attorneys. Nowhere in the public record was the establishment of an Office of Public Counsel discussed.

2. *Establishment of the Office of Public Counsel.*—The Director of RSPO, utilizing the discretion granted him under the statute to organize the employment of attorneys, established within the RSPO an Office of Public Counsel to coordinate these activities. On February 15, 1974, the Director of RSPO issued an organization memorandum giving the Director of the Office of Public Counsel authority to "operate independently of the administrative control of the Director (RSPO) in the sense that he is free to develop for the record * * * any views and data which he deems pertinent."¹⁵² This memorandum created the first Office of Public Counsel in the Federal government.

3. *Duties of the Office of Public Counsel.*—The Office of Public Counsel was assigned first to assist RSPO in coordinating public hearings on the reorganization. According to the Office's first report, the duties of the permanent staff in Washington were to coordinate the "outreach attorneys"¹⁵³ activities in the field, analyze their reports, and provide additional legal and technical advice. The report states:

The permanent staff will be primarily responsible for providing the outreach attorneys with information for evaluating and analyzing legal problems with respect to the Act, and for formulating legal strategies and other methods of assuring adequate representation of the diverse interests of the public.¹⁵⁴

The Office of Public Counsel developed an attorney "outreach program" initially to help prepare testimony for rail users, including private individuals, environmental groups, and communities scheduled to appear at the Commission's hearings. Twenty five outreach attorneys were hired to assist in the presentation and representation

¹⁴⁹ The Office was directed by the Congress to, among other things: "Solicit, study and evaluate the views . . . [of] Governors . . . ; mayors and chief executives of political subdivisions . . . ; shippers; the Secretary of Defense; manufacturers, wholesalers, and retailers . . . ; consumers of goods and products shipped by rail; and other interested persons." 45 U.S.C. 715(d) (Supp. 1975.)

To carry out this responsibility Congress directed the Commission to: "employ and utilize the services of attorneys and such other personnel as may be required in order to properly protect the interests of those communities and users of rail service which, for whatever reason, such as their size or location, might not otherwise be adequately represented * * *." 45 U.S.C. 715(d)(2) (Supp. 1975.)

¹⁵⁰ *Id.*

¹⁵¹ . . . employ and utilize the service of attorneys and such other personnel as may be required in order properly to protect the interests of those communities and users of rail service which for whatever reason, such as their size or location, might not otherwise be adequately represented in the course of the reorganization process as provided by this Act." Sec. 205(d)(2), Pub. L. 93-236.

¹⁵² Report of the Office of Public Counsel, RSPO, ICC, July 12, 1974, at 1.

¹⁵³ For a more thorough examination of the outreach attorney concept and its use by the Office of Public Counsel, see Theodore S. Bloch and Robert Jay Stein, "The Public Counsel Concept in Practice," 16 *Wm. & Mary L. Rev.* 215 (Winter, 1974) (hereinafter cited as Bloch and Stein).

¹⁵⁴ Report of the Office of Public Counsel, RSPO, ICC, July 12, 1974, at 3.

of the views of the users in the 17 States covered by the reorganization. These attorneys were responsible for:

* * * direct dissemination of reorganization news emerging from Washington, for alerting various interest groups of developments which might particularly affect them, for rendering legal and technical assistance to members of the public regarding all aspects of the reorganization process.¹⁵⁸

The Regional Rail Reorganization Act of 1973 called upon the RSPO to conduct two sets of public hearings, the first to obtain public comment on a preliminary Department of Transportation report on the reorganization, and the second to obtain public reaction to the United States Railway Association's¹⁵⁹ Preliminary System Plan.¹⁵⁷ The Office of Public Counsel provided technical and legal assistance to all rail users for both sets of hearings.

To help stimulate participation in the first set of hearings, outreach attorneys worked in the regions where the hearings were to be held. During the week before the hearings, they sought out rail users who might be affected by the reorganization plan. Some attorneys telephoned all potentially interested parties in their area to ensure that they were aware of the hearing dates and of the Public Counsel's resources available to assist them in preparing testimony.

The 25 outreach attorneys in the first series of hearings were congratulated by all. The hearings showed deep public concern about the reorganization, as was evident in 50,000 pages of testimony.¹⁵⁸ The Administrative Law Judges presiding over these hearings reported that the outreach attorneys had performed their tasks admirably. The Commission's Chief Administrative Law Judge informed the Director of the Rail Services Planning Office that: "The performance of the public counsel engaged on this project was most gratifying. * * *" ¹⁵⁹

Moreover, the testimony supplied the Rail Services Planning Office by the public with the assistance of the Public Counsel's Office was of such high quality that RSPO Director George Chandler, in his transmittal letter for the May 2 Report to the United States Railway Association, wrote:

* * * the public has demonstrated not only that it is most insistent that its views be heard, but also that it can make a valuable contribution to the planning process by supplying both vital information and ideas which are timely and imaginative.¹⁶⁰

Following completion of these hearings the Office of Public Counsel's Washington staff, working in tandem with its outreach attorneys, compiled a summary of the public testimony. This summary was "one of the primary bases of RSPO's May 2, Report" analyzing the Department of Transportation's Report. The Public Counsel stressed "the public's rejection of massive branch line abandonments as the means of accomplishing reorganization of the railroads."¹⁶¹

A second set of hearings was held in March 1975 to obtain public reaction to the United States Railway Association's Preliminary System Plan. The Office of Public Counsel assisted the public in preparing testimony for these hearings. On March 17, hearings were conducted

¹⁵⁸ *Id.* at 2.

¹⁵⁹ 45 U.S.C. 711.

¹⁵⁷ 45 U.S.C. 717.

¹⁵⁸ Rail Services Planning Office "Public Response to the Preliminary System Plan" 1975 at 2.

¹⁵⁹ *Id.* at 2.

¹⁶⁰ *Id.* at 2.

¹⁶¹ *Id.* at 5-6.

in 27 cities throughout the rail reorganization region. More than 1,900 witnesses testified, creating a hearing record over 10,200 pages long.¹⁶² Before the hearings took place, outreach attorneys held more than 200 meetings reaching some 2,000 persons in an attempt to explain the provisions of the Association's Preliminary System Plan.¹⁶³

After the second set of hearings was completed, the Public Counsel prepared a synthesis of the public's reaction to the proposed Preliminary System Plan. This synthesis formed the basis of RSPO's critique of the Plan.

The Office of Public Counsel reported that the public testimony focused on six major issues. According to the Public Counsel's synthesis, a majority of the public participants challenged the accuracy and appropriateness of the Association's branch line analysis. Some 1,400 persons "provided specific data on most of the 343 branch line segments USRA recommended for abandonment." Several witnesses concentrated on the Association's emphasis on branch line profitability, questioning the validity of the Association's analysis. Moreover, the Association was criticized for "failure to consider special community factors in its branch line analysis" and "failure to consider the social, economic and environmental impacts of rail abandonment."¹⁶⁴

The users' criticism of the Association's preliminary system plan was, for the most part, detailed and factual. These presentations were strengthened by the special legal and technical assistance provided by the Office of Public Counsel.

Besides providing assistance to interested persons in presenting their views at the Commission hearing, the Office of Public Counsel with its economic consultants developed a "Guide for Evaluating the Community Impact of Rail Service Discontinuance,"¹⁶⁵ a community self-help device designed to assist communities to weigh the costs and benefits of rail abandonment. The Office also assisted in the preparation of comments submitted to RSPO rulemaking proceedings defining terms; testified before Congress on the issue of the integrity of the planning process; and took a direct part in litigation.¹⁶⁶ The Office also wrote numerous letters to the Department of Transportation and the United States Railway Association reflecting public hearing comments.

After the hearing process was complete, the Public Counsel focused its activities on three main issues:¹⁶⁷ "Transferring the ownership of subsidized branch lines from the bankrupt estates to Conrail; lengthening and increasing the Federal share of the subsidy program; and assuring permanent rail user representation on the Federal level."

Helping communities save branch line service occupied most of the outreach attorneys' time. Before the Railroad Revitalization and Regulatory Reform Act became law, the Office had set up more than 50 meetings with Senators and Congressmen for their constituents.¹⁶⁸

¹⁶² Published by Office of Public Counsel, January 10, 1975.

¹⁶³ Report of the Office of Public Counsel, RSPO, ICC, March 1976 at 12.

¹⁶⁴ Public Response to the Preliminary System Plan, Office of Public Counsel, RSPO, at 2-3.

¹⁶⁵ "Guide for Evaluating the Community Impact of Rail Service Discontinuance," Office of Public Counsel, RSPO, Jan. 10, 1975.

¹⁶⁶ Bloch and Stein, *supra* note 153, at 228.

¹⁶⁷ Report of the Office of Public Counsel, RSPO, ICC, March 1976, at 13.

¹⁶⁸ *Id.* at 12.

The Office also prepared 167 briefs, carefully outlining community arguments, for continuing branch line service. Many of the Office's comments were adopted in the United States Railway Association's Final System Plan and in the recent rail legislation.

4. *Representing interested persons.*—The Office of Public Counsel did not attempt to identify and represent "the public interest," even though the Commission is charged with this responsibility. Its strategy was rather to increase the quality of participation of users of rail services in the regional rail reorganization process. The individuals and groups assisted by the Office of Public Counsel had traditionally been denied a role in governmental decisionmaking processes because of an inability to present their views appropriately. The Office of Public Counsel helped these community groups and private interests to present their own position almost as effectively as the Department of Transportation, the United States Railway Association, major railroad companies, and the Association of American Railroads.

The Office of Public Counsel was not designed to supplant the Commission in its role as harmonizer of the private interest and determiner of the public interest. Rather, it presented to the Commission and other Federal bodies additional information on which to base decisions, information which could be obtained only from private parties not already well represented.

5. *Positive response to the Office of Public Counsel.*—Members of both the Senate and House Commerce Committees were impressed with the effectiveness of the Office of Public Counsel's efforts in assisting and increasing public participation in the reorganization process. Their belief that it had been a valuable experiment led to proposals for expanding the powers of the Office and establishing it as a permanent institution.

During the floor debate on passage of the House version of the Railroad Revitalization and Regulatory Reform Act of 1976, Congressman James J. Florio (D.-N.J.), advocated the creation of a statutory Office of Rail Public Counsel and congratulated the staff of the RSPO's Office of Public Counsel. He stated:

I think it is clear that Congress has already in 1973 in the authorizing statute adopted the concept of the public counsel. In fact, the Office of Public Counsel has performed a yeoman's service in the case of the preliminary system plan and the final system plan. For many municipalities and many individuals in the United States the public voice thus was represented to the ultimate decision that resulted in the elimination of some railroad [lines], the abandonment of certain lines and the incorporation of some lines.¹⁶⁹

6. *Office of Rail Public Counsel.*—On February 5, 1975, the President signed into law the Railroad Revitalization and Regulatory Reform Act of 1976. The signing created the Office of Rail Public Counsel to "... study, evaluate, and present before the Commission, in any proceeding, formal and informal, the views of those communities and users of rail service affected by proceedings initiated by or pending before the Commission,"¹⁷⁰ and to "evaluate and represent, before the Commission and other Federal agencies . . . [and shall by other

¹⁶⁹ 121 Con. Rec. 12775 (daily ed. Dec. 17, 1975).

¹⁷⁰ Public Law No. 94-210 Sec. 304(a) (4) (e).

means] assist the constructive representation of the public interest in safe, efficient, reliable and economical rail transportation services."¹⁷¹

The Congress gave the Office of Rail Public Counsel "standing to become a party to any proceeding";¹⁷² authority to "petition the Commission for initiation of proceedings";¹⁷³ and, authority to "seek judicial review of any Commission action on any matter involving a common carrier by railroad."¹⁷⁴

In order to insure the independence of the Office it was given complete fiscal and administrative autonomy. Although it must "assist the Commission in the development of a public interest record in proceedings before the Commission,"¹⁷⁵ it is not under the Commission's control, and is not required to submit reports to the Commission.

The Director, appointed by the President for a 4-year term, is solely responsible for the operation of the office. Additionally, budget requests and budget estimates for this office are to be submitted concurrently to the Congress and the President¹⁷⁶ to insure that neither the Commission nor the Executive interfere with the programming of the Office.

7. Delay by the President in appointment of a director.—Section 304 of the Railroad Revitalization and Regulatory Reform Act of 1976 establishes an independent Office of Public Counsel, evidence that the concept had gained wide acceptance in the Congress. Section 304 of the Act states:

There shall be established, within 60 days after the date of enactment of this section, a new independent office affiliated with the Commission to be known as the Office of Rail Public Counsel. The Office of Rail Public Counsel shall function continuously pursuant to this section and other applicable Federal laws. The Office of Rail Public Counsel shall be administered by a Director. The Director shall be appointed by the President, by and with the advice and consent of the Senate.¹⁷⁷

Though the President had signed the bill into law, he failed to fulfill his responsibilities under the statute.

No appointment was transmitted to the Senate by the White House within the 60 days specified in the law. This delay particularly frustrates the role which Congress contemplated that the Office would play in several major actions which the Commission and other Federal agencies were directed to take, and to which deadlines were assigned under the 1976 Act, in order to expedite the revitalization and reform program.

By April 5, 1976, when the 60 days had expired and the President's nominee for Director of the Office of Rail Public Counsel had not been transmitted to the Senate, it appeared that the Office of Rail Public Counsel would not be able to participate in many important proceedings facing statutory deadlines. On April 22, 1976, Subcommittee Chairman Moss and the Honorable Fred B. Rooney, Chairman of the Transportation Subcommittee of this Committee, reminded the President in writing that until he fulfilled his statutory responsibility the office could not begin operations. They also expressed the belief that

¹⁷¹ Public Law No. 94-210, section 304(a)(4)(c).

¹⁷² Public Law No. 94-210 Sec. 304(a)(4)(a).

¹⁷³ Public Law No. 94-210, section 304(a)(4)(b).

¹⁷⁴ Public Law No. 94-210, section 304(a)(4)(c).

¹⁷⁵ Public Law No. 94-210, section 304(a)(4).

¹⁷⁶ Public Law No. 94-210, section 304(a)(5).

¹⁷⁷ Public Law 94-210, section 304(a)(1).

any delay in the appointment of a Director to this office was "not in the public interest."¹⁷⁸

A month later, the President still had not transmitted a nominee to the Senate. Chairmen Moss and Rooney wrote once more to the President, reminding him of his statutory obligation and pointing out that numerous important proceedings were taking place without contributions from the Office of Rail Public Counsel because of his failure to appoint a Director. A customary reply from the White House was received stating "... your letter will be called promptly to the President's attention."¹⁷⁹ As of September 1976, the President still has neither replied further to the Chairmen's letter nor announced his choice for Director.

8. *Conclusion.*—The creation of the initial Office of Public Counsel under the Rail Services Planning Office was an important step in enhancing the participation of railroad users in the Commission's decisionmaking processes. The positive contributions of the Office of Public Counsel in the reorganization process illustrate clearly that new methods designed to involve the public in decisionmaking processes on complex agency matters can indeed be successful. The experience of the Office also demonstrates that broad segments of the public have much to contribute to the decisions made by Federal agencies. In the case of the initial stages of the railroad reorganization, however, these voices could not have been heard effectively without the assistance of public counsel.

The Office of Public Counsel was not created to assess the public interest independently. The Congress clearly reserved this responsibility for the Commission. However, the Congress was cognizant of the need for the establishment of a distinct mechanism to assist unorganized, inexperienced, and financially pressed users in presenting their views to assist the Commission in determining the public interest. Without such user participation in the reorganization process, the Commission and other Federal bodies involved would have been deprived of valuable information.

The statutorily created Office of Rail Public Counsel is designed to go beyond the relatively passive role carried out by its predecessor under RSPO. The new office will advocate rail user positions before the Commission and other rail regulatory bodies. Although the Office now has an advocate's function, its emphasis on providing additional information to the Commission and other railroad regulatory bodies so that they may assess the "public interest" fairly, has not changed.

The Office of Public Counsel is not an ICC ombudsman nor is it a body which will act upon each and every complaint from rail users. The effectiveness of the Office would be severely hampered if it used its resources in this manner. The Commission already has in place numerous avenues for addressing specific consumer complaints.¹⁸⁰ The Office should not assume this function.

The Subcommittee concludes that the Office of Public Counsel can be a valuable means of increasing constructive participation by representative citizens in government decisionmaking processes. The Sub-

¹⁷⁸ Letter from Honorable John E. Moss, Honorable Fred B. Rooney to President Gerald R. Ford, April 22, 1976.

¹⁷⁹ Letter from Charles Leppert, Jr., Deputy Assistant to the President, to Honorable John E. Moss.

¹⁸⁰ Hearings, *supra* note 73, at 25-28.

committee is concerned that the President's failure to appoint a director to the Office, as required by statute, has not only denied proper public representation in the statutorily mandated proceedings but has also denied the agencies involved the benefit of additional information relevant to their public interest determinations. The President has been seriously derelict in this regard. The Congress should enact legislation to assure that, if the President refuses to appoint a candidate in the time specified, another official body should choose the nominee.

C. PLANNING

A system of planning is essential to effective application of the national transportation policy and other national goals assigned by the Congress to the Interstate Commerce Commission. The Commission must "promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation."¹⁸¹ It must insure also that these goals are achieved consistently with the Congressionally mandated goals of balanced urban growth,¹⁸² energy conservation,¹⁸³ and a healthful ecological balance.¹⁸⁴ In the words of the Commission, the national interest dictates that "if the Commission is to meet the objectives of the national transportation policy 'developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as by other means,' then crisis planning must be supplanted by anticipatory planning."¹⁸⁵

The Commission's failure to establish an effective policy planning program as a necessary adjunct to its regulatory responsibilities is the subject of this case study.

1. *What is planning?*¹⁸⁶—In dealing with the activities of the Interstate Commerce Commission as they relate to planning we are not simply referring "to the narrow administrative planning by

¹⁸¹ 49 U.S.C. 1.

¹⁸² 84 Stat. 1792.

¹⁸³ 89 Stat. 571.

¹⁸⁴ 42 U.S.C. 4331.

¹⁸⁵ Interstate Commerce Commission Budget Estimates Fiscal Year 1977. Salaries and Expenses Prepared for the Office of Management and Budget, September 1975 at 20.

¹⁸⁶ "What is a plan—A plan is a present description of a set of future events. Its purpose is to permit current decisions to be made in the light of their futurity. Future events are in the present somewhat uncertain. Otherwise a plan would be simply a statement of what is going to happen. No amount of planning effort will permit this type of foretelling of the future. Planning involves deciding '... what futurity do we have to factor into our present thinking and doing, what time spans do we have to consider and how do we converge them to a simultaneous decision in the present.' Planning is valueless unless it results in current decisions."

To summarize, planning carries the idea of laying out a course of action that one can follow in the "now" to reach some desired goals by the time "then" has become "now." It is a philosophical posture which asserts that a decision maker should be in a position to assess alternatives before he selects one. It argues that if one thinks hard about what one is going to do ahead of time he is better off . . ." B. R. Pierce, unpublished thesis, *The Nature and Extent of Long Range Planning in the Transportation Regulatory Agencies*, Stanford Univ. (1971).

The classic model of rational, comprehensive planning includes the following elements: "(1) Identification of goals and objectives; (2) Design of alternative policies and courses of action to achieve the objectives; (3) Assessment of the costs and benefits of each alternative in terms of the primary objectives and in terms of secondary effects—both short and long term; (4) Selection of the most desirable policy or course of action; (5) Implementation of the selected policy or course of action; and (6) Monitoring the results, and evaluating progress toward the stated objectives, with alertness for unexpected secondary impacts."

[In order to be successful the classic model must be supported by:] "(1) foresight, which consists of continually scanning the national and international situation to recognize signs of potential problems or opportunities, and (2) using the full range of forecasting techniques to project possible future adverse consequences of current policies and trends."

Long Range Planning prepared for the Subcommittee on Environment and Atmosphere, House Comm. on Science and Technology, 94th Cong., 2d sess., Ser. BB, at 5 (May 1976).

which a commission may seek to improve the efficiency of its internal mechanism, but to broad policy planning, the kind of planning, for example, by which the ICC might seek to evolve a national transportation policy."¹⁸⁷ "In other words planning can be defined simply as organized foresight in preparation for administrative action. It implies that the agency assumes some initiative in organizing its work and takes some responsibility for achieving certain goals."¹⁸⁸

As political scientist Robert Cushman observed, not only is planning necessary to assure that the most efficient means are used to obtain clear national goals but also to inform the public and regulated industry what the government's aims are and how these aims will be achieved.¹⁸⁹

2. *The need for planning.*—There is no dispute that some type of policy planning is an essential element in regulation of transportation. As Professor Oppenheim observed:

Planning is essentially just another label for research that is an indispensable adjunct to the effective discharge of the regulatory duties of the (Interstate Commerce) Commission.¹⁹⁰

The recognition that planning is essential to regulation of transportation was expressed some 41 years ago by Joseph Eastman, Coordinator of Transportation (1935–1939) later Chairman of the Interstate Commerce Commission (1939–1942) in his 1935 Coordinator of Transportation report. Eastman observed:

If the government is to deal wisely with transportation, however, it must be able to look ahead, prevent evils from developing, if possible, and plan for the future. A tribunal for the settlement of controversies is necessary, but some public agency should be locating the fundamental problems, both present and prospective, and giving study and creative thought to them.¹⁹¹

Eastman argued further that "a major defect in our system of regulation * * * is the absence of any sufficient provision for planning and prevention."¹⁹² According to Eastman, planning should be designed to "prevent" evils from arising, as well as curing evils "after they arise." Eastman observed "There is a need for foresight—for consideration of tendencies and trends and where they are leading—in order that those that are desirable may be encouraged and those that are undesirable discouraged."¹⁹³

In the absence of planning, the Commission has tended to react to events rather than shape these events. Decisions are *ad hoc* rather than in conformance to a plan. The Commission's process of regulation is crisis-oriented rather than preventive.

¹⁸⁷ Cushman, *supra* note 11, at 727.

¹⁸⁸ Bernstein, *supra* note 20, at 176.

¹⁸⁹ Cushman, *supra* note 11, at 727–728.

¹⁹⁰ S. Chesterfield Oppenheim, *The National Transportation Policy and Inter Carrier Competitive Rates 123–24* (1945). Cushman observes:

The broad field of economic regulation is one in which sound policy planning is acutely needed. It is a field which includes some of the most important phases of the nation's economic life; such planning ought, therefore, to provide an intelligent approach to some of our more pressing problems. Furthermore, if there is to be regulation of business and industry by the national government, it is no more than fair to those who are to be regulated to let them know in a broad way what are the government's aims in the field of regulation, and how the achievement of these ends is likely to affect private rights. For its own sake, and for the sake of those affected by its regulatory policies, the government ought to know where it is going and how it expects to get there. This is planning. Cushman, *supra* note 11, at 727.

¹⁹¹ Eastman cited in Cushman, *supra* note 11, at 140.

¹⁹² I.L.R. Doc. No. 294, 74th Cong., 2d sess., Report of the Federal Coordinator of Transportation, 1935, at 41.

¹⁹³ *Id.* at 40.

Failure to plan is closely related to the Commission's almost total reliance on a case by case approach to regulation and its infrequent use of the rulemaking process. Moreover, failure to plan clearly demonstrates the Commission's unwillingness to utilize fully its quasi-legislative powers. Some experts argue that the Commission simply is not structured to set policy and plan.¹⁹⁴ Others argue that the problem lies in individual Commissioner's unwillingness to take stands on controversial issues. In any event, little policy planning has resulted.

3. *What ICC planning could be: Recommendations.*—(a) *Booz, Allen, Hamilton Study*: The Commission has responded to the need for an internal planning mechanism for execution of the national transportation policy by seeking external counsel. A 1960 Booz, Allen and Hamilton Management report, entitled *Organization and Procedures Survey of the ICC*, recommended the establishment of an "Office of Transportation Policy and Analysis"¹⁹⁵ to coordinate planning and execute economic analysis for the Commission. The firm suggested that this Office contain a section "to analyze the transportation situation from the point of view of separate types of carriers," and "major industry developments, practices and problems, new technologies and inter-industry competitive trends." The firm also urged increased efforts to "provide both analytical support to case proceedings and broader economic analysis."¹⁹⁶ The recommendation to create an Office of Transportation Policy and Analysis was not adopted.

(b) *Fitzwater and Smith Reports*.—Difficulties arising from the Commission's failure to plan reflected further in its enforcement program. The two recent Commission surveys cited above reported that there was no mechanism for bringing the Bureaus of Operations, Enforcement, Accounts, and Economics together to plan effective prospective enforcement based on reliable data.

The Fitzwater report states: "Field officers operate in a vacuum, often pursuing obsolete policy directives and, in some instances, developing their own."¹⁹⁷ The Commission does not issue policy direc-

¹⁹⁴ Eastman did not, however, believe that the Commission was capable of carrying out this type of planning. He observed that the Commission spent too much time on the resolution of individual cases and relatively little time if any discussing or creating future policy. Eastman wrote: "Anyone who has served on the Commission knows that it is not well adapted to such work. Its functions are performed under quasi-judicial procedure. Its attention is occupied with specific causes which must be decided. It has little time for thought and research on broad lines."

Eastman asserted that the only way to ensure that planning was carried out would be to take it away from the Commission and place it in the hands of an agency closely tied to but not controlled by the commission. Professor Robert Cushman's work supported Eastman's conclusions. Cushman explained in his comprehensive study of the Commission in 1941 that the Interstate Commerce Commission's inability to plan was due more to the problems of the Commission structure than any other single factor. Cushman observed that the failure of agencies like the ICC to plan can be traced to: (1) lack of time and the great burden of day-to-day work; (2) inadequate research staffs; (3) the incapacity of commissioners to plan activities. Commissions "are not usually made up of the kind of men from whom broad policy planning could reasonably be expected." (4) the fact that planning often calls for coordination of interests lying in the areas of several regulatory agencies; (5) the fact that commissions are composed of human beings with impulses, interests, and foibles, who have a substantial stake in the status quo and who feel that wise planning should avoid radical changes. "One would hardly expect the Interstate Commerce Commission, even if it were a more useful planning agency than it is, to plan a broad transportation policy which did not have the continuance of that commission embedded in its provisions. Bernstein, *supra* note 20, at 177-178. Other Commission experts including Huntington and Commissioner Allison have made similar remarks about the Commission's inability to plan.

¹⁹⁵ Booz, Allen & Hamilton, *Organization and Procedures Survey of the Interstate Commerce Commission*, 19.

¹⁹⁶ *Id.* at 20.

¹⁹⁷ Hearings, *supra* note 73, at 115.

tives on a regular basis to the field staffs because these issues are not regularly discussed by the Commissioners. Moreover, the Fitzwater report states that the Commission's enforcement program is "reaction rather than action oriented," and as a result enforcement "activities have little lasting impact."¹⁹⁸

As so little communication on policy has passed between Washington and the field staffs, it is difficult for Washington to understand clearly how the effects of its regulation may suggest corrective legislation. The Fitzwater report indicates that important data to base policy on are not now available nor has the Commission directed that they be made available.¹⁹⁹

The Smith report's authors also criticized the Commission for not planning its enforcement policy. In redeveloping its "national compliance policy based upon its national transportation mission," the Commission, they said, should evaluate the impact of regulation. They recommended that the Commission establish a mechanism:

To ascertain the socioeconomic impact of surface carriers both subject to and outside the scope of its jurisdiction so that program objectives and implementation will rest upon the most recent, salient aspects of public interest and need.²⁰⁰

(c) *Blue ribbon panel*.—In the spring of 1975, recognizing the need to increase the Commission's economic research capabilities, the Commission's Blue Ribbon Panel on Regulatory Reform suggested that:

* * * greater economic analysis into the decisionmaking process be induced, preferably through increased reliance on the Bureau of Economics or, alternatively, by placing economists directly on decision makers' staffs * * *²⁰¹

Although the panel does not specifically mention the policy planning implications of this move, its emphasis on economic analysis is a necessary step toward improving the Commission's base for policy planning.

4. *Steps by the Commission*.—In the last few years the Commission has taken a number of steps to increase its planning and policy capabilities.

The Penn Central bankruptcy in June 1970 caught everyone off guard, including the Interstate Commerce Commission. The economic consequences of the collapse are still to be fully realized. The cost to the Nation to restore much of the service discontinued as a result of the rail system's collapse is running into the billions of dollars. If the Commission had in place some type of planning and prevention mechanism, the effects of the bankruptcy could at least have been moderated.

Following the Penn Central debacle, the Commission took steps to prevent being caught unaware again. In 1972, it created what it calls the Early Warning System which "has developed criteria and methods which give the Commission the capability of pinpointing railroad danger spots well before the occurrence of financial disaster."²⁰² Recently this capability was extended to the largest motor carriers.

¹⁹⁸ *Id.* at 101.

¹⁹⁹ *Id.* at 113.

²⁰⁰ *Id.* at 268.

²⁰¹ Blue Ribbon Panel Recommendation No. 49.

²⁰² Interstate Commerce Commission Budget Estimates for Fiscal Year 1975, prepared for the Office of Management and Budget, September 1973.

The Commission has refined this system to a point where it is regarded as accurate and reliable.

The Commission has also developed a Carrier Outlook Review (COR) which projects on a quarterly basis the economic climate nationwide and assesses its impact on the carriers.

As a result of the Blue Ribbon Panel's findings, the Commission decided to strengthen the Bureau of Economics. On September 24, 1975, a "major reorganization" of the Bureau of Economics was announced by the Commission. The Commission now employs some 39 professionals in this Bureau whereas in 1969 it employed only 6.

What the Commission does not have, however, is an office charged with translating the information gathered by these mechanisms and branches into Commission policy. The Commission also does not transmit this potentially vital information to Congressional committees responsible for drafting major legislation for the monitored operations.

Finally, in order to insure that the Commission will engage in policy planning, recognizing that it has failed to do so in the past, the Congress in the 1976 Rail Act, directed the Commission's now permanent Rail Services Planning Office to:

Assist the Commission in developing, with respect to economic regulation of transportation, policies which are likely to result in a more competitive, energy-efficient, and coordinated transportation system which utilizes each mode of transportation to its maximum advantage to meet the transportation service needs of the nation.²⁰³

Conduct an ongoing analysis of the national rail transportation needs, evaluate the policies, and programs of the Commission on the basis of such analysis, and advise the Commission of such evaluation.²⁰⁴

In order to carry out this statutory directive, the Commission has created the position of Planning Coordinator to coordinate Commission and RSPO activities to comply with the Act. The ICC has also established a section of Transportation Policy Planning within RSPO.

To sum up, over the past few years the Commission has:

Created an Early Warning System to monitor carriers in financial difficulty;

Instituted a Carrier Operations Reporting System to monitor the economic health and welfare of the different modes and to forecast possible trends;

Increased the resources of its Bureau of Economics;

Created pursuant to the Rail Revitalization and Regulatory Reform Act of 1976 an Office of Transportation Policy Planning; and

Established the position of Planning Coordinator to coordinate planning activities between the staff and the Commission.

5. Need to reactivate the Commission's Planning and Policy Committee.—The Commissioners themselves have done little to develop policy actively, coordinate planning, or allot their time personally to careful policy and planning issues.

Major obstacles to such action are evident in the experience of the Commission's Policy and Planning Committee.

One of the Commission's three standing committees, the Planning and Policy Committee was established in December 1964 and charged

²⁰³ 45 U.S.C. 74, Sec. 205(d) (2) as amended, February 5, 1976.

²⁰⁴ 45 U.S.C. 75, Sec. 205(d) (4) as amended, February 5, 1976.

with the responsibility of coordinating all Commission policy and planning activities. The Commission minutes on the establishment of the Committee state:

The Committee, on its own motion or upon reference from the Commission or any division thereof, shall process basic policy and planning problems to a level where they will be ready for analysis, discussion, and action by the Commission.

The Committee shall report to the Commission through the Chairman of the Commission.²⁰⁵

The Committee is composed of three members appointed by the Chairman. Committee members serve a 1-year term. Although three members of the Commission have always been appointed annually to the Committee, the Committee has persistently failed to meet even once a year.

Since 1970, the Committee has never met. Moreover, when the Committee did meet prior to 1970, the Committee never undertook any policy or planning activities. Although the enactment of the Rail Act gave the Commission the green light to set up a staff level planning mechanism, the Committee still has not met.

Commission statements on the establishment of the section of transportation policy and the position of Planning Coordinator clearly contemplate a major role for the Committee. The Commission's functional statement describes the Rail Services Planning Office as the office which "performs all staff-level planning" for the Commission and states that the Office "maintains close cooperation with and reports to, among others, the Commission's Policy and Planning Committee." The functional statement declares:

The Planning Coordinator shall report directly to the Chairman of the Commission and on a monthly or other basis as requested by the Commission's Policy and Planning Committee * * * He shall act as liaison between the Office of the Chairman and the Policy and Planning Committee, on the one hand and the Rail Services Planning Office, on the other. * * *

* * * shall evaluate, upon request of the Chairman, the Commission, or the Policy and Planning Committee * * *. He shall coordinate and monitor special projects as directed by the Chairman, the Commission or the Policy and Planning Committee.²⁰⁶

The record of the Policy and Planning Committee raises serious doubts about the future effectiveness of this process. What is not clear is the priority, if any, to be given to policy and planning activity. Will the caseload assigned to members of this Committee be reduced? Will the Committee meet on a regular basis (once a month or once a year)? Will the Commission ask for the Committee's recommendations on major regulatory decisions? Will the Committee report to the Commission on a regular basis presenting policy and planning proposals for the Commission's review? How carefully will the Committee oversee the Rail Services Planning Office and the Planning Coordinator's activities?

6. First task for the committee: setting basic priorities.—At present, when making a decision on a case before him, a Commissioner may cite whichever national goals he wishes to emphasize in order to fit the case at hand. As a result, policy is created to justify Commission

²⁰⁵ Interstate Commerce Commission Minutes establishing the Policy and Planning Committee, December 1, 1964.

²⁰⁶ Functional Statement for the Planning Coordinator, 1976.

action, not to serve as its basis and the Commission's decisions tend to be inconsistent.

To avoid contradictory decisions, the Commission must establish a system of clear priorities for a broad plan for surface transportation regulation, enumerating the goals and objectives of regulation and assigning the weights each goal and objective should receive in Commission decisions. The Commission cannot properly regulate surface transportation until it has carefully structured a plan along these lines. This is a task for the now moribund Policy and Planning Committee, appropriately staffed.

Not only does the present "pick and choose" system of policy selection confuse the regulatee, it also makes it impossible for the Congress to measure the effectiveness of Commission efforts objectively.

The "quality of administration and organization" of the Interstate Commerce Commission "can be evaluated by an analysis of the amount and kind of planning in which it engages." The Subcommittee agrees with Bernstein's statement that:

Planning is directly related to the basic approach which the Commission uses in its regulatory work. It underlies its policymaking activities, relationships of commissioners to staff and of the Commission to other agencies, and the emphasis the Commission places on formal adjudication as distinguished from other types of activities.²⁰⁷

Use of planning further "implies that the agency assumes some initiative in organizing its work and takes some responsibility for achieving certain goals."²⁰⁸

The Commission should develop a national surface transportation plan in close cooperation with the Executive Branch, the Congress, and interested members of the public. The plan should clearly identify the goals and objectives of surface transportation regulation based upon the most advanced socioeconomic research available. The National Transportation Study Commission should cooperate with the Commission in developing a plan which will reflect the National Transportation Policy including other water and air transportation goals, and other Congressionally mandated goals such as balanced growth, energy efficiency, and positive ecological impact.

To insure that the National Surface Transportation Plan is reflected in all Commission proceedings, a Policy Coordination Statement should be completed and included in the record of all proceedings. The statement should reflect how the Commission's decision complies with the objectives and goals of the Surface Transportation Plan. The Policy Coordination Statement should be prepared by the Commission's planning staff for the public record. The Commission should work with the Congress and the Executive as well as the National Transportation Study Commission and the public in developing the guidelines for the preparation of the statements.

7. *Conclusion.*—Although its capacity to carry out planning has been greatly enhanced in the last few years, a well defined plan for surface transportation regulation or even a system of basic priorities has not been forthcoming from the ICC.

²⁰⁷ Bernstein, *supra* note 20, at 176.

²⁰⁸ *Id.*

The Subcommittee concludes that Commission development of a Surface Transportation Plan is essential. Moreover, all major Commission decisions must be based on examination of a Policy Coordination Statement. This Policy Coordination statement should be prepared for each case to assure that the Commission's decisions closely follow the Commission's Surface Transportation Plan.

D. COORDINATION WITH OTHER GOVERNMENTAL GROUPS

In recent years, the Commission has faced obstacles as it sought support for its regulatory programs and regulatory improvements from the Department of Transportation, the Office of Management and Budget and the Congress.

1. Relations with the Department of Transportation (DOT).— When two or more agencies of government have jurisdiction in the same field, their competition and rivalry may stimulate progress. However, rivalry can lead to obstruction which can be dissolved only through leadership by the President and the Congress. The failure of the Department of Transportation and the Interstate Commerce Commission to come to terms on safety programs for motor carriers has impeded their common efforts to protect the public from highway hazards.

Under the Interstate Commerce Act, all motor carriers are required to prove that they are fit, willing, and able properly to perform the service proposed and that they are in compliance with the Commission's rules and regulations before their applications for either temporary or permanent authority or extensions of authority will be granted. The Commission is responsible for judging the fitness of the applicant. In this determination of fitness, it must consider the carrier's safety record.

DOT, under the Transportation Act of 1967, is responsible for maintaining and reviewing the safety record of all licensed carriers. This information, once compiled, must be transmitted to the Commission for inclusion in fitness proceedings.

Since 1967, when Congress transferred carrier safety responsibilities to the Department of Transportation, many motor carrier fitness applications²⁰⁹ have been processed without opportunity to review critical safety fitness information. ICC and DOT share the responsibility for examining the safety record of the applicants. Although DOT may intervene in the Commission's fitness decisions if the applicant in question has a poor safety record, it has done so, until recently, only occasionally. DOT has not supplied the Commission with safety information in its possession which clearly challenged the carrier's fitness. The Commission, on its part, has not extended itself to secure this safety information.

Congress has imposed an obligation on the Secretary of Transportation to assist the Commission in exercising concurrent responsibility for promoting motor carrier safety. The Transportation Act of 1967 directs DOT:

(A) to furnish upon request of the Commission a complete report of the safety compliance of any carrier,

²⁰⁹ 49 U.S.C. § 1653(e)(4).

(B) to have made such additional inspections or safety compliance surveys which the Commission deems necessary or desirable in order to process an application or to determine the fitness of a carrier, and

(C) if the Commission so requests, to intervene and present evidence in any proceedings in which a determination of fitness is required [emphasis added].²¹⁰

Observance of these provisions by DOT has not been scrupulous. Although DOT must intervene in reviews of applications for permanent authority for carriers with a poor safety record, it has done so only 12 times in the past 9 years. Of the 12 interventions, 8 occurred before May 1974. From that time until January 1976, DOT intervened 4 more times. In view of the number of applications filed, these interventions are insignificant. The Commission receives about 6,000 applications for permanent authority every year and approves 85 percent. For temporary authority, applications come to about 4,000 a year, with 75 percent approved.

DOT is only obligated to notify the ICC that an applicant for temporary authority has a poor safety record, and has done so on numerous occasions, although in the past year its rate of intervention in temporary applications has declined.²¹¹

The Commission has not sought such information from DOT aggressively. It has failed to inform DOT of its need for safety information in conjunction with permanent authority applications except through its regular publication of notices of applications in the Federal Register. Consequently, the safety records of most applicants have not been properly screened by the ICC since 1967, a dereliction of responsibility. The weakness of communication between ICC and DOT has led to confusion about their respective responsibilities and has resulted in a failure to review properly important applications.

The Commission has been aware of these flaws for many years. Recently the Commission was criticized by its own Blue Ribbon Panel on Regulatory Reform for failing to assess fitness carefully. The Panel's Report stated:

In carrying out its responsibilities under Part II of the Act, the Commission must assess the overall fitness of Applicants before permanent motor carrier authority can be awarded.²¹²

Accident statistics show clearly that trucks are a major contributor to highway fatalities. Many truck crashes are attributed to errors of drivers pressed to meet schedules or carry loads in excess of safety limits set by DOT.²¹³ DOT, however, does not have the power effectively to penalize violations of safety regulations; the ICC can do so by ruling a lack of fitness.

Expert opinion holds that the ICC's power to withhold or suspend operating authority for safety violations is "the most potent enforcement tool."²¹⁴ Both agencies have recently increased the flow of safety information and the incidence of intervention by DOT to stop carriers with poor safety records from extending their authority. A stronger effort by both the Commission and the Department of Transportation

²¹⁰ *Id.*

²¹¹ Interview by Subcommittee Staff with Edward J. Schack, Associate Director, Office of Proceedings, Interstate Commerce Commission, August 10, 1976.

²¹² Blue Ribbon Panel on Regulatory Reform Report, Interstate Commerce Commission, Recommendation Number Fifty.

²¹³ A comparison of ICC mileage statistics for Class I and II carriers of property, and statistics for total fatalities per 100 million miles traveled, compiled by the National Safety Council, for calendar year 1972, show that truck fatalities are twice as high as the national average and almost four times as high as the national average for fatalities per 100 million miles traveled on limited access "super" highways.

²¹⁴ *Id.*

is essential nonetheless to reduce highway risks. Formal arrangements for coordination between DOT and ICC for this purpose should proceed in a spirit of full and continuing cooperation.

2. *Relations with the Office of Management and Budget.*—The Commission has been unable to win approval from the Office of Management and Budget for its planned use of funds and besides cutting the Commission requests for funds over the past 4 years by some \$4–6 million, roughly 10 percent of the total budget, in fiscal years 1971 and 1972 “OMB prohibited the Commission from filling 140 additional positions authorized by the Congress.”²¹⁵

Support from OMB for funding public participation through the development of an internal Office of Public Counsel has been denied.²¹⁶ The Commission asserts that other progressive ideas, such as the Office of Public Counsel, have been shelved because OMB refused to support them.

While supporting in concept Commission action to establish an internal Office of Public Counsel, OMB refused to supply the Commission with the manpower and funds necessary to sustain such an office. When the Commission requested 30 positions and \$1.6 million to begin operation of the Office, OMB would not approve either item.²¹⁷ The Office of Management and Budget agreed to let the ICC transfer 15 of its enforcement positions to the Office only after the Commission appealed OMB’s initial referral to approve new appointments. Transferring the positions would have resulted in a net loss of 15 positions from an already overburdened Commission program rather than the net gain needed to establish the office. As the ICC did not believe it could shift staff to the Office without serious damage to its enforcement program, the Office could not be opened.

V. Conclusions and Recommendations

The Subcommittee concludes that the Interstate Commerce Commission has demonstrated major deficiencies in its regulation of surface transportation. The Commission’s own panels have found that its compliance effort concentrates on enforcement actions of dubious value and neglects major violations. This policy appears to be based on the Commission’s unwillingness or inability to set and communicate priorities for its staff. Furthermore, the Commission’s failure to act swiftly on the findings and recommendations in these reports demonstrates a state of the institutional inertia.

The Commission continues to support burdensome entry regulations which stifle competition and increase the cost of transportation services. The Commission has not utilized its resources or taken steps sufficient to determine, through empirical studies, whether new forms of regulation or less regulation are necessary. The 11 Commissioners have been in the past and continue to be unable to reach agreement on the most conservative plans designed to gather the relevant data necessary to determine whether and to what extent its regulation is costly or unnecessary. While the Commission has made

²¹⁵ Hearings, *supra* note 73, at 22.

²¹⁶ Letter from Daniel O’Neal, Vice Chairman, Interstate Commerce Commission, to Charles E. Hill, Dec. 31, 1975.

²¹⁷ *Id.* at 3.

some procedural improvements of late and the Office of Rail Public Counsel is a major asset, generally change has been slow in coming. Many of the recommendations below can be implemented by the Commission through administrative action. We urge the Commission to act swiftly on these recommendations.

The Subcommittee recommends the following:

(1) The Commission should review its major regulatory goals and the policies necessary to achieve those goals. In the course of this review, the Commission should seek to eliminate, to the maximum extent possible under present law, all forms of promotional regulation and entry barriers. With respect to the related matter of rate regulation, the Congress has recently taken a significant step. The Railroad Revitalization Act of 1976 includes provision for flexible rail rates within prescribed limits.

The Subcommittee believes that elimination of unnecessary regulation will allow free market forces to operate more effectively and efficiently than is now possible. It will also permit the Commission to devote a larger proportion of its resources to the goal of achieving economic efficiency within each mode of transportation as well as gains in safety, environmental impact, and energy conservation. In light of the highly competitive potential of the trucking industry, the appropriate committees of the Congress should give consideration to legislation comparable to provisions in the Rail Act of 1976, which would allow flexible rates in this industry.

(2) Clear policy guidelines must be issued to all agency compliance staff, particularly to staff in the field, prescribing in detail the Commission's regulatory and enforcement priorities.

(3) All segments of the Commission's enforcement program should be organized under a single enforcement Bureau under the general direction of a Commissioner and Bureau director.

(4) The Office of Rail Public Counsel should be supported wholeheartedly by the Commission: the public counsel technique should be extended to other modes of surface transportation in order to increase user participation in the regulatory process.

(5) The Commission should develop a National Surface Transportation Plan which clearly establishes a system of priorities and a schedule for regulation, specifying goals and objectives and assigning the weights each goal and objective should receive in the Commission's decisions. The Commission should also require staff to compose a Policy Coordination Statement for all major cases, to indicate conformance of the Commission's decisions with the Surface Transportation Plan.

The Subcommittee has considered also the fundamental question of whether the Commission should continue in its present form. Its coexistence with other departments and agencies concerned with different aspects of the transportation industry, notably the Department of Transportation and the Civil Aeronautics Board, decidedly complicates the task of forming a coherent, unified approach to the development of a national transportation policy. In addition to the effects of fragmentation of authority on the planning function, the Subcommittee believes that the Commission may have become incapable of reaching agreement on policy with the timeliness demanded by external events.

The Subcommittee, therefore, recommends that Congress and the National Transportation Study Commission, established by Public Law 94-280, consider what might be the most effective unit or units within the Federal government to administer matters pertaining to transportation and national transportation policy. The Congress and the Study Commission should specifically address the following questions:

- (1) Should the ICC as it is presently organized be abolished?
- (2) Should there be one or several agencies charged with the transportation responsibilities imposed by Federal law?
- (3) If one, should the agency be under the direction of a single administrator, or commission?
- (4) If the Federal mandate with respect to transportation should not be assembled in a single agency, how should the responsibilities and functions be divided? However that may be resolved, the regulatory as distinguished from promotional aspects of the Federal responsibility should be, we believe, located in an independent regulatory agency. The planning and policy making functions could be placed, perhaps together with similar functions with respect to other modes of transportation, in either an independent or an executive branch agency.

Answers to these questions should be arrived at as soon as possible. Congressional action should follow completion of this review.

Changes in the regulation of surface transportation require intense study of economic issues as well as issues within the purview of the political scientist. They require examination also of all facets of the industry, not merely those presently within the jurisdiction of the Interstate Commerce Commission. For these reasons, although the Subcommittee believes the status quo is unacceptable, we do not now propose final answers to the organizational questions.

FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 10

FEDERAL POWER COMMISSION

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CHAPTER 10

FEDERAL POWER COMMISSION

I. Summary

The Federal Power Commission (FPC) regulates hydroelectric projects on navigable waters and the transportation and sale for resale in interstate commerce of natural gas and electricity.

The Subcommittee regretfully finds that the FPC, in recent years, has demonstrated a conscious disregard of its statutory duties, extending in varying degrees to all facets of its regulatory responsibilities. We believe the case studies discussed in this report graphically illustrate the agency's neglect of its Congressional mandate to protect consumers from price and supply exploitation by the companies it regulates.

The failure has been most prevalent with respect to producers of natural gas. Our numerous investigations of natural gas producers, over the past 18 months, lead inescapably to the conclusion that instead of enforcing the obligation of producers to deliver certificated volumes, as required by the Natural Gas Act, the FPC has dedicated its energies to urging that the Congress deregulate the price of natural gas. The ideological commitment of a majority of the Commissioners to dismantling the price control provisions of the Act has gravely impaired the Commission's ability to administer the Act in the public interest.

The Commission's recent decisions setting the price for natural gas sold in interstate commerce demonstrate a comparable disregard for the requirements of the law. The Natural Gas Act requires that prices be fixed at levels that are "just and reasonable." The Act has been interpreted by the current and previous Commissions to require rates based on producers costs plus a fair rate of return. While decisions permit other factors to be "considered," rates must be based primarily on costs and the 17.7% return on equity currently authorized. The Commission's responsibility was emphasized by the Supreme Court: "... to protect consumers against exploitation at the hands of natural gas companies." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944). In its July 1976 decision increasing the price of "new" natural gas 184% from 50¢ per Mcf to \$1.42 per Mcf, the Commission totally abdicated its responsibility. More significant is the fact that major sections of the Commission's opinion purportedly furnishing support for its decision are without any factual basis. The opinion appears to be intended to circumvent the law, not uphold it.

Our third study discusses the Commission's use of American Gas Association (AGA) reserve data to demonstrate that the FPC lacks reliable information for regulation. We conclude that Commission decisions are often based on unreliable evidence supplied by the companies it regulates.

The fourth study documents the lack of representation of consumer interests before the FPC. While the Commission's rules and regulations provide ample opportunity for consumer participation, few who speak for consumer interests possess the means to utilize this opportunity. The FPC staff cannot represent the consumer interest well because it does not have appeal rights and because it is otherwise over-burdened.

Our fifth study draws heavily on the Subcommittee's field hearings on FPC electric utility rate regulation to show that the Commission's procedures work to the detriment of consumers and, at times, to the detriment of regulated utilities. Regulatory lag, the fast paper shuffle, pancaking, and FPC suspension practices all contribute to the perpetuation of rates that can be excessive, discriminatory, or ruinous. On the basis of our study, we believe that the cost of FPC delays, industry delaying tactics, and multiple rate filings should be shifted from consumers to the regulated utilities. This can be done by eliminating the practice of allowing rates to go into effect before they are thoroughly investigated, tested in a public hearing, and ruled upon by the Commission.

1. As to the failure of the Commission to enforce natural gas producer delivery obligations we recommend that:

- FPC Commissioners be selected who are committed to carrying out the Commission's statutory mandate;
- the FPC establish an enforcement division;
- vigorous congressional oversight be exercised and legislation be enacted which would increase the accountability of the FPC to the Congress by providing a mechanism structured to facilitate Congressional oversight and expedite the flow of information to the Congress;
- legislation be enacted which would require that the Commission enforce the commitments of natural gas producers to deliver;
- legislation be enacted which would give the Commission the power to compel the producers to deliver gas from the Federal domain whether or not the producers have accepted a certificate from the FPC; and
- legislation be enacted which would give the Commission the power to regulate the sale of natural gas in intrastate commerce.

2. As to the Commission's abandonment of cost-based producer rate regulation we recommend that legislation be enacted which would require that the Commission adhere to cost-based rate regulation.

3. As to the FPC's lack of reliable information for regulation we recommend that:

- the FPC secure its own data under oath;
- when the FPC must rely on data that industry supplies it audit or otherwise verify it to the degree necessary to assure its accuracy; and
- the Commission be authorized by statute to collect financial, reserve, production, and distribution data from all segments of the natural gas industry, including companies it does not regulate.

4. As to the lack of representation for consumer interests before the FPC we recommend that:

- an office of consumer counsel at the Commission be established by statute;

- funds and authority be granted the FPC to provide financial assistance to intervenors representing consumer interests; and
- the FPC staff be strengthened and accorded the right to institute judicial review of Commission decisions.

5. As to the FPC's procedural and administrative practices we recommend that:

- FPC receive funding sufficient to eliminate regulatory delays attributable to a lack of resources;
- legislation be enacted that would streamline the Commission's regulatory process, simplify its procedures, and relieve consumers of unjust rates by refusing FPC authority to give effect to proposed rates until their final approval and adjudication; and
- final FPC decisions on applications to increase rates be issued within 10 months of filing.

6. Finally, we recommend that a reorganization of energy regulatory and information gathering functions, including Federal lease management, be undertaken to consolidate existing regulatory functions affecting oil and natural gas in an independent regulatory Commission to eliminate current waste and lack of coordination resulting from unproductive duplication of functions. The energy regulatory functions should remain insulated from programs designed to promote the development of energy resources and research, public education, or advocacy associated with such promotion. These promotional functions should remain within the Executive Branch. Coordinated energy policy and planning functions would remain a necessary part of both an independent energy agency and an Executive Branch agency. The reorganization of existing energy regulatory functions should eliminate and minimize currently fragmented energy responsibility and accountability together with its attendant inconsistencies, delays, and duplication of effort.

II. Mandate

The Federal Power Commission's legislative mandate consists of two principal statutes covering three major fields. Part I of the Federal Power Act¹ creates the Commission and delegates to it the responsibility for the licensing of hydroelectric projects on navigable waters or government lands. Part II of this Act directs the Commission to regulate the transmission and sale for resale of electric energy in interstate commerce.

The second statute, currently a major subject of debate, is the Natural Gas Act. It delegates to the Commission the responsibility to regulate the transportation and sale for resale of natural gas in interstate commerce and requires "just and reasonable rates."²

Both the electric power and the natural gas industries perform three basic functions: the initial production or generation of electricity or gas; transmission for long distances over high voltage lines and in pipelines; and local distribution to the ultimate consumer.

Each of the two statutes acknowledges that companies supplying energy sources to the consumer are "affected with a public interest."³

¹ 16 U.S.C. 792 et seq.

² 15 U.S.C. 717 et seq.

³ See Section 201(a) of the Federal Power Act 16 U.S.C. § 824(a) and Section 1(a) of the Natural Gas Act 15 U.S.C. § 717(a).

Public utility companies⁴ are usually monopolies, legally sanctioned in order to avoid the waste of duplicative facilities in the same geographic area.

The appropriate extent of Federal regulation over the natural gas industry is a subject of dispute. Although natural gas producers are not legal monopolies (e.g., licensed), the industry is dominated by large corporations which generally are integrated vertically. The industry has the characteristics of an oligopoly. Regardless of whether the industry is oligopolistic⁵ or affected with a public interest,⁶ the constitutional authority of the Congress to regulate interstate commerce, or matters affecting interstate commerce, is clear. Accordingly, although companies supplying either electricity or natural gas are commonly considered to be "affected with a public interest" and usually dominate their markets, neither of these conditions is prerequisite to their regulation by the Federal government.

Because public utility companies usually dominate markets, they can and historically did, take advantage of their dominant position to charge arbitrarily high prices for their services.⁷ Until passage by Congress in 1935 of Parts II and III of the Federal Power Act and the 1938 Natural Gas Act, the prices distributors paid for electricity and natural gas that moved in interstate commerce were uncontrolled.

Despite intrastate regulation of prices to the consumer, judicial decisions had prohibited States from regulating the interstate aspects of the electric and natural gas industries.⁸ They took full advantage of this judicially created regulatory gap.⁹ The Congressional purpose in enacting the Federal Power Act and the Natural Gas Act was to plug this gap.¹⁰ These statutes charged the Federal Power Commission with the responsibility to regulate the interstate transmission and interstate sale or resale of electricity and natural gas.

The two statutes sought to prevent uncontrolled wholesale rates from forcing the retail price to ultimate consumers beyond fair and reasonable bounds. Referring to the Natural Gas Act, the Supreme Court said that "(t)he Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."¹¹

Thus, the mandate of the FPC is to ensure both reasonable prices and adequate supplies of electricity and natural gas.¹² The Supreme

⁴ Such as natural gas pipeline companies or electric generating companies.

⁵ *Brass v. Stoeser*, 153 U.S. 391 (1894).

⁶ *Nebbia v. New York*, 291 U.S. 502 (1934).

⁷ Final Report of the Federal Trade Commission to the Senate of the United States pursuant to Senate Resolution No. 83, 70th Congress, 1st Session, on Economic, Corporate, Operating, and Financial Phases of the Natural-Gas Producing, Pipeline, and Utility Industries, With Conclusions and Recommendations, S. Doc. 92, Part 84-A, 70th Congress, 1st Session (1936).

⁸ *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 689 (1947). H.R. Rep. No. 709, 75th Congress, 1st Session.

⁹ Final Report of the Federal Trade Commission to the Senate of the United States pursuant to Senate Resolution No. 83, 70th Congress, 1st Session, on Economic, Corporate, Operating, and Financial Phases of the Natural-Gas Producing, Pipeline, and Utility Industries, With Conclusions and Recommendations, S. Doc. 92, Part 84-A, 70th Congress, 1st Session (1936).

¹⁰ See *Phillips Petroleum Co. v. State of Wisconsin* 347 U.S. 672, 682-84. (1954); *Federal Power Commission v. Transcontinental Gas Pipeline Corp.*, 365 U.S. 1, 22, 26 (1961); *Atlantic Refining Co. v. Public Service Commission of the State of New York*, 360 U.S. 378, 388 (1959); *Panhandle Eastern Pipeline Company v. Public Service Commission of Indiana*, 322 U.S. 507, 520 (1947); *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 472-73 (1950).

¹¹ *Atlantic Refining Co. v. Public Service Commission of New York, et al.*, 360 U.S. 378, 388 (1959).

¹² See *Gainesville Utilities Dept. v. Florida Power Corp.*, 402 U.S. 515, 529 (1971).

Court has said that the "heart" of the Natural Gas Act "is found in those provisions requiring initially that any 'proposed service, sale, operation, construction, extension or acquisition . . . will be required by the present or future public convenience and necessity' and that all rates and charges 'made, demanded, or received' shall be 'just and reasonable'".¹³ In addition, no company selling or transporting natural gas in interstate commerce may "make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage" or "maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."¹⁴

Similarly, the Federal Power Act provides that in § 205(a), 16 U.S.C. 824(d), all rates and charges for electricity shall be "just and reasonable" and in § 205(b), 16 U.S.C. 824a(b), that no public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage or maintain any unreasonable difference in rates, charges or facilities.

III. Implementation of Mandate

The FPC in the last 5 years has demonstrated a conscious disregard of its statutory mandate to protect the consuming public from exploitation, especially by natural gas producers.

Natural gas producers may sell their gas to interstate pipeline companies which transport the gas from producing fields for sale either to industrial customers or to distributing companies that, in turn, sell to industrial or commercial users and residential consumers. Since the Supreme Court decision in *Phillips Petroleum Company v. Wisconsin*,¹⁵ the Commission has been responsible for regulating sales prices between natural gas producers and interstate pipelines.

The FPC sets producer rates on the basis of historical average costs of exploring for, developing, and producing natural gas. Former Commission Chairman Nassikas testified that:

The Supreme Court and circuit courts have told us that Congress, under the Natural Gas Act of 1938 did not empower us to go higher than cost based prices. . . . [W]hen the court gets down to each case the Commission is reversed when it attempts to depart in any way from an energy model, or a cost model not directly based on cost . . . as interpreted by the courts, the Natural Gas Act prohibits regulation on the basis of economic factors unrelated to costs . . . We cannot set price except on cost based factors . . .¹⁶

In recent years, however, a majority of Commissioners appointed by the President and confirmed by the Senate have been ideologically and politically committed to deregulating the price of natural gas that producers sell to interstate pipelines.¹⁷ Alternatively, the Commission seeks authorization to prescribe prices on the basis of economic factors

¹³ *Atlantic Refining Co. v. Public Service Commission of New York, et al.*, 360 U.S. 378, 388 (1959).

¹⁴ 15 U.S.C. § 717c(b).

¹⁵ 347 U.S. 672 (1954).

¹⁶ Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session, Vol. I, pt. 2, at 1623 (1975).

¹⁷ Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session, Vol. I, pt. 2, at 1096-97, 1190, 1623-24, 1630 (1975).

unrelated to costs.¹⁸ Thus, for several years, the FPC's position on the necessity of regulating the price of sales to interstate pipelines by producers of natural gas (the so-called wellhead price) has been in conflict with the FPC's statutory mandate, as interpreted by the Supreme Court's *Phillips* decision.

This inconsistency between the law and the FPC's predilections has produced a series of judicial decisions overruling Commission actions not in keeping with the concept of cost-based regulation as mandated by the Natural Gas Act.¹⁹ The courts have repeatedly reminded the FPC it was not created for the purpose of deregulating or advocating deregulating the price of natural gas.

In *FPC v. Texaco*, the Supreme Court decided that:

The requirements of the Act . . . do not distinguish between small and large producers with respect to just and reasonable rates. Even if the effect of increased small producer prices would make a small dent in the consumer's pocket, when compared with the rates charged by the large producers, the Act makes unlawful all rates which are not just and reasonable, and does not say a little unlawfulness is permitted.

* * * * *

In concluding that the Commission lacks the authority to place exclusive reliance on market prices, we bow to our perception of legislative intent. (Emphasis supplied.) 417 U.S. at 399.

In *McDonald v. FPC*, the District of Columbia Circuit Court of Appeals stated:

We perceive no reason why the special relief provisions in the Commission's area rate orders cannot be utilized to encourage needed gas exploration. But when the Commission permits an individual producer to depart from an area rate structure which has been developed with reference to average areawide costs to provide producers a necessary but not excessive profit incentive for gas exploration, its regulatory trust requires it to give complete consideration to that producer's individual costs in order to ensure that the producer's profit margin is not thereby raised to an unreasonable level. 505 F. 2d at 364.

In *Consumers Union v. FPC*, the District of Columbia Circuit Court of Appeals concluded that:

The Commission is certainly free to try out new techniques, but it is constrained to show that its departures from established practice are reasonable, particularly where, as here, the change is crucial to its decisions. It has not made that showing on the record in this case. 510 F. 2d at 659.

In *Consumer Federation of America v. FPC*, the same court held that:

Our examination of Order 491 convinces us that the Commission has exceeded its authority under the Act. In essence, it has attempted to remedy the shortfall of supply in the interstate market by authorizing a supplemental injection of large quantities of gas through sales freed from the constraints of meaningful regulation. We reject the FPC's claim that § 7(c) supports this substantial, partial deregulation, and find that the Commission has neglected its rate control responsibilities under the Act. (Emphasis supplied.) 515 F.2d at 360.

If an indicia of effective administration by a regulatory agency is the number of judicial affirmations of agency decisions, then the Commission has been singularly lacking in success.

¹⁸ *Id.* at 1621.

¹⁹ See, e.g., *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974); *MacDonald v. FPC*, 505 F.2d 335 (D.C. Cir. 1974), cert. denied sub nom. *Mitchell v. MacDonald*, 421 U.S. 912; *Consumers Union v. FPC*, 510 F.2d 656 (D.C. Cir. 1974); *Public Service Commission of New York v. FPC*, 511 F.2d 338 (D.C. Cir. 1975); *Consumer Federation of America v. FPC*, 515 F.2d 347 (D.C. Cir. 1975), cert. denied, 423 U.S. 903.

The FPC's neglect of its statutory mandate is not limited to regulation of gas producers. The agency has been characteristically derelict in its statutory duties extending, in varying degrees, to all facets of its regulatory responsibilities. In the following sections we discuss the significant aspects of the agency's operations. Our recommendations follow.

IV. Case Studies

A. THE FPC'S FAILURE TO ENFORCE THE DELIVERY OBLIGATIONS OF NATURAL GAS PRODUCERS

Throughout the summer and fall of 1975, the FPC repeatedly warned that the Nation could expect a critical shortage of natural gas during the winter months of 1975-76. While the predicted disabling proportions of this interstate gas shortage have not materialized, interstate natural gas consumers have not received all of the gas to which they are entitled.

A predicted deficit relative to demands for natural gas has been asserted by the Federal Power Commission since 1971.²⁰ The inability of an interstate pipeline to supply natural gas, referred to as the "curtailment" of natural gas service, is described by the Chairman of the FPC as "the difference between the supply a pipeline has contracted to deliver and the amount it is actually able to supply."²¹ What the FPC has not emphasized is that natural gas pipelines have had insufficient gas to deliver to their customers because natural gas producers have delivered insufficient gas to the pipelines.

The sale of natural gas from producers to pipelines is accomplished by negotiation and consummation of contracts. If the natural gas sold to the pipeline will be transported interstate the producer must seek FPC authorization to sell his gas. The Commission analyzes and evaluates the terms and conditions of the contract. If it finds the contract to be in the public interest, it issues a certificate of public convenience and necessity to the producer authorizing the sale of the gas in interstate commerce for resale by the pipeline company. The Commission then assigns a "rate schedule number" to the producer to identify this sale.

According to the past Chairman of the FPC, John N. Nassikas, "... all certificates issued by [the FPC] to a natural gas producer authorizing the sale of gas *is (sic) for a fixed quantity of gas* to be computed in accordance with the terms of the particular sales contract which is the basis of the application" (emphasis supplied).²²

²⁰ On October 31, 1970, the FPC began compiling data on curtailments by interstate pipeline companies. According to the FPC, this data shows the following trend in actual curtailed deliveries of firm requirements of natural gas by interstate pipeline companies:

Year:	Volume (billions of cubic feet)
1971	286
1972	649
1973	1,131
1974	1,679
1975	2,696

²¹ Statement of Richard L. Dunham, Chairman, Federal Power Commission, before the Subcommittee on Energy and Power, House Committee on Interstate and Foreign Commerce on February 2, 1976 at 3.

²² Letter dated October 14, 1975, from FPC Chairman John N. Nassikas to Honorable John E. Moss, Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce at 3.

Since deliveries of natural gas to interstate pipelines have been declining steadily in volume and the consequent deficit threatens substantial harm and economic dislocation to sections of the country that depend on this source of energy, it is reasonable to inquire if the agency has been determining if natural gas producers are delivering to pipelines the quantity of gas that their FPC certificates require and enforcing these delivery obligations.

The FPC acknowledges that natural gas producers are *not* delivering the quantities required by their contracts. When asked at a Congressional hearing on October 24, 1975, "Isn't it a fact that a considerable number of rate schedules are now not making their minimum daily contract quantity?" The FPC's Deputy General Counsel responded "I would say that is a fact".²³ He acknowledged moreover that the agency does not know how many or what percentage of the gas producers are not meeting their delivery obligations.²⁴

The Commission has known since 1971 that natural gas producers are not meeting minimum daily delivery obligations.²⁵ The FPC has refused to identify which rate schedules are deficient, so that appropriate action, as discussed below, could be taken to enforce producers' delivery obligations.

However, specific evidence about the shortfall in deliveries has been developed recently by this Subcommittee. A July 1975 Preliminary Report by the Subcommittee staff on delays in natural gas production by Cities Service Oil Company concluded that Cities Service had purposely delayed commencing the workover of its wells, and that this delay disrupted deliveries of substantial quantities of gas during the critical winter season.²⁶

A second report by the Subcommittee released in October 1975 on the decline in deliveries at the Garden City, Louisiana field operated by Exxon Corporation and Quintana Petroleum Corporation found that the producers had failed to undertake diligently the work projects necessary to maintain deliveries of natural gas from the field and establish production from untapped reservoirs. In addition, the Subcommittee's report recommended that the FPC should forthwith commence proceedings and issue orders requiring producers to undertake work projects and any other steps necessary to maintain deliverability of natural gas at contractual and certificate levels, in accordance with the legal obligations of the producers.²⁷

A November 1975 Report by the Subcommittee on the decline in deliveries at the Bastian Bay Field, Louisiana, found that Getty Oil

²³ Hearings on Long-Term Natural Gas Issues Before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session, at 8 (1975).

²⁴ *Id.*

²⁵ *Id.*, at 97.

²⁶ Preliminary Staff Report Concerning Delays in Natural Gas Production By Cities Service Oil Company. Prepared by the Staff of the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session (1975).

²⁷ Natural Gas Supplies: Declining Deliverability at Garden City, La. Report by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session (1975). See also Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session, Vol. II, at 1-122 (1975).

Company and Tenneco, Inc., the two producers of the field, had not proceeded with drilling sufficient to maintain natural gas deliveries.²⁸

Confronted with this evidence, on October 14, 1975, the Commission issued a Statement of Policy, Order No. 539, which supposedly reiterated the Commission's authority and intention to enforce the delivery obligations of producers under FPC certificates. Order No. 539 directed all natural gas companies to comply with all requirements as incorporated in their FPC certificates of public convenience and necessity relating to deliverability or production. The Commission stated it would, on its own motion, undertake appropriate enforcement proceedings, either administratively or in the Courts, to ensure producer compliance with gas delivery or production requirements contained in FPC certificates. In addition, the Commission invited complaints seeking enforcement of certificate obligations and stated that each affected producer, pipeline, or distributor should take all "appropriate actions" to enforce delivery obligations in the appropriate administrative or judicial forum at Federal, State, or local levels.

More specifically, Order No. 539 directed that natural gas companies comply with all natural gas deliverability requirements to meet certificated quantities of natural gas. Order No. 539 promulgated Section 2.83 of the FPC's General Policy and Interpretations which provided that "the *certificated minimum daily delivery obligation* of the seller (1) shall be determined in accordance with applicable provisions specifically set forth in sellers contract unless otherwise changed by the certificate authorization, (2) shall be without regard to any contractual reservations contrary to the certificate authorization, (3) and shall remain in full force and effect unless and until changed by appropriate certificate authorization amendment based upon Applicant's full documentation of, *inter alia*, the reasons for any such proposed amendment, the sales production history, the amount of remaining connected reserves of Applicant dedicated under the contract and the status of Applicant's nondeveloped reserves dedicated under the contract." (Emphasis supplied). If a party has not secured an appropriate certificate amendment and there are circumstances resulting in the delivery of a lesser quantity of natural gas than any certificated minimum daily delivery obligation, the Commission required that the party file a verified report setting out the circumstances of such deficient deliveries and the corrective actions which the party proposes to undertake in order to meet any delivery deficiency experienced. In addition, each producer receiving an FPC certificate was required to report to the Commission the results of all reserve determinations or subsequent reserve redeterminations.

Recognizing that the language of Order No. 539 would be of no effect whatsoever unless the Commission was able to enforce it, the Commission commenced a proceeding to accumulate data in a form necessary to identify the rate schedules for which insufficient quantities of

²⁸ Natural Gas Supplies: Declining Deliverability at Bastian Bay Field, La., Report by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session (1975). See also Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session, Vol. II, at 123-219 (1975).

gas were being produced. On December 17, 1975, the FPC issued a Notice of Proposed Rulemaking presenting a new Form No. 108 to provide the information in a form necessary to evaluate and implement the Statement of Policy expressed in Order No. 539. The Notice cited as justification for Form 108 the following:

There are, at present, thousands of rate schedules on file with this Commission. It would be infeasible for the staff of the Commission to complete a full review of each and every rate schedule and then transfer that information to a data processing format.²⁹

To date, however, despite the danger of future producer-caused gas shortages the agency has failed to promulgate Form No. 108 and it still lacks the compilation of information necessary to enforce producer delivery obligations.

On July 30, 1976, the FPC issued Order No. 539-B which undermines the natural gas producer's obligation set forth in Order No. 539. Order No. 539 required natural gas producers to deliver a fixed quantity of natural gas which was termed the producers' "certificated minimum daily delivery obligation." This volume was a ratio of the producer's recoverable reserves under the acreage dedicated to its contract. Order No. 539-B revokes this delivery standard and substitutes in its place a "prudent operator" standard. The Commission states it will henceforth use the prudent operator test to judge the service obligations of producers under its certificates. In addition, Order No. 539-B eliminated Section 2.83 of the Commission's General Policy and Interpretations.

The FPC's first opportunity to apply its recently expressed commitment to enforce its rules and regulations with respect to natural gas deliveries came soon after the promulgation of its Order No. 539 on October 14, 1975.

Testifying at Congressional hearing held on October 24, 1975, Commissioner Don S. Smith pointed to a 1974 Commission Opinion which said that FPC would hold a natural gas producer (in this case the Gulf Oil Corporation) to its obligations.³⁰ Inquiry immediately following this testimony revealed that Gulf had failed to meet its delivery obligations by an increasing margin throughout the years 1974 and 1975.³¹

This particular case presented the FPC with an unusual opportunity to enforce its policy on natural gas deliverability obligations (and to reduce curtailments) because the certificate issued to Gulf provided for a *warranty* sale by Gulf to the Texas Eastern Pipeline system.³² A warranty contract is an *unconditional* commitment by a producer to deliver a specific amount of natural gas each day.

Warranty contracts are rare. Normally, natural gas sales contracts do not contain a stated daily delivery volume. Rather, these contracts state that the daily delivery obligation of the producer will be determined by a ratio of the recoverable reserves contained under

²⁹ 41 Federal Register 3096.

³⁰ Hearings on Long-Term Natural Gas Issues Before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session, at 97 (1975).

³¹ Hearings on Regulatory Reform Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 2nd Session, Vol. II, at 294 (1976).

³² *Id.*, at 293.

the acreage that the producer has dedicated to the performance of the contract. Although this ratio can vary, it usually is 5,000 to one or 7,300 to one (i.e., 365 days per year times 20 years equals 7,300).

After the Gulf contract was negotiated, the FPC on December 19, 1963, issued a certificate of public convenience and necessity to Gulf Oil Corporation for a sale of natural gas to the Texas Eastern Pipeline Company. The contract called for a daily delivery of 500,000 Mcf of gas with a right in Texas Eastern to call for a maximum of 625,000 Mcf of gas each day.³³

On August 24, 1971, Gulf filed an application with the FPC seeking to amend its certificate to raise the price for its gas. A public hearing resulted in the issuance of FPC Opinion No. 692 on April 19, 1974.³⁴ In this Opinion the Commission denied Gulf's request. The statements contained in Opinion No. 692 and the Commission's subsequent Opinion No. 692-A (denying rehearing)³⁵ are important to an assessment of the FPC's subsequent disposition regarding the enforcement of Gulf's warranty sale.

Most importantly, in Opinion No. 692 the Commission said, "We think Gulf's *contractual warranty* to be *unconditional*, and we are firmly convinced that its *certificate obligations* are *unconditional*" (emphasis supplied). The FPC specifically found that Gulf should not be relieved of any of its certificated obligations, including its obligation to deliver up to 625,000 Mcf/day to Texas Eastern.

The Commission said that Gulf's certificate "gave rise to rights and obligations" which "are clearly ours to interpret, modify, or enforce." Opinion Nos. 692 and 692-A interpreted Gulf's certificate obligations and refused to modify those obligations.

The FPC found also that Gulf had not made a sufficient effort to fulfill its delivery obligation to Texas Eastern. In refusing to allow Gulf to increase its price, the Commission said "we see no reason why interstate consumers should be called upon to underwrite the future exploration effort that should have been undertaken in the past."

Opinion 692-A reiterated that "(t)he Commission Order issuing that [Gulf] certificate (30 FPC 1559) shows beyond question that the Commission interpreted the contract to embody an *unconditional* delivery obligation." The Commission's order continued, "Gulf's corporate warranty of delivery was the key factor in the Commission's approval of this entire project in 1963." The FPC added: "(a)s defined in its certificate, Gulf is under the obligation to deliver so much gas at a given price, *we see no reason to relieve it of that obligation* ..." (emphasis supplied).

Despite the FPC's clear statements of Gulf's *unconditional* delivery obligation, and despite a severe shortage of natural gas on Texas Eastern's pipeline system,³⁶ when it came to the Commission's attention

³³ *Id.*

³⁴ 51 FPC 1340 (1974).

³⁵ 52 FPC 593 (1974).

³⁶ Hearings on Regulatory Reform Before the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce, 94th Congress, 2nd Session, Vol. II, at 297 (1976). In addition, Exhibit 31 in the FPC proceeding shows that Texas Eastern's actual 1974 systemwide curtailment was 217 Bcf. If Texas Eastern had received all the gas it should have from the Gulf warranty contract in 1974, Texas Eastern's systemwide curtailment would have been 130 Bcf or about 40% less. Exhibit 31 shows that Texas Eastern's actual 1975 systemwide curtailment was 266 Bcf. If Texas Eastern's systemwide curtailment would have been 167 Bcf or about 37% less.

that Gulf had not been meeting its daily delivery obligation the FPC did *not* move to enforce Gulf's delivery obligation by either ordering Gulf to comply with its certificate or by seeking judicial enforcement of Gulf's certificate obligation.³⁷

Instead, on November 7, 1975, the agency commenced an administrative proceeding by issuing an Order to Gulf to show cause why it should not be required to comply with its certificate obligations.³⁸ The FPC's action was inconsistent with its prior holding that Gulf's delivery obligation was unconditional. Moreover, the Commission's decision not to enforce Gulf's delivery obligation was accomplished when both the Federal Energy Administration and the FPC³⁹ were predicting ominous shortages of natural gas.

On August 13, 1976, an FPC Administrative Law Judge issued an initial decision in the Gulf *show cause* proceeding. Significantly he found Gulf in violation of its certificate. In addition, the decision indicates the possibility that the conduct of Gulf and Texas Eastern was criminal.

This decision in the Gulf Show Cause proceeding tends to support evidence developed by this Subcommittee, that several natural gas producers are withholding natural gas supplies from the interstate market. In addition, the judge's decision implicitly questions the Commission's actions and the necessity for an administrative proceeding prior to taking enforcement action on Gulf's obligations to deliver.

The judge found that the FPC already had held that Gulf's delivery obligations were unconditional but noted that an administrative agency is empowered to alter prior decisions "when compelling reasons and the public interest require such action." At the time the Commission instituted the administrative proceeding in November 1975, when the need for gas by consumers was most acute, there were no compelling reasons to avoid immediate enforcement of Gulf's unconditional delivery obligation. The judge noted that Gulf's strategy was to "ward off any decisive Commission action against it." The selection of an administrative proceeding by the Commission suited Gulf's plan neatly.

³⁷ Section 20(b) of the Natural Gas Act provides:

(b) Upon application of the Commission the district courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this act or any rule, regulation, or order of the Commission thereunder.

³⁸ It should be noted that John N. Nassikas was Chairman of the FPC when Order No. 539 was promulgated. Richard L. Dunham was Chairman of the FPC when the decision was made not to enforce Gulf's unconditional warranty obligation. In addition, Commissioner John H. Holloman, III had testified on October 24, 1975, at Hearings on Long-Term Natural Gas Supplies Before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session, at 148 (1975) that "... if these supplies [of natural gas] are being withheld we [the FPC] should be able ... to nail somebody and I think the policy of this Commission has to be that ... the book has to be thrown at them and that the full force of law has to be brought to bear with respect to those that we make a case against." Commissioner Holloman did not dissent for the Commission's order which set the FPC's administrative procedures in motion instead of enforcing Gulf's unconditional warranty obligation. In another case before the FPC entitled *Investigation Into The Activities of South Texas Natural Gas Gathering Company and All Companies Affiliated With It*, in which the Commission found that South Texas and its affiliates had violated the Natural Gas Act no less than 73 times, including the diversion of interstate gas to the more lucrative intrastate market, the Foster Natural Gas Report noted in its Report No. 1067 at p. 9 that at the Commission meeting Commissioner Holloman did not support referral of the matter to the Department of Justice for prosecution.

³⁹ See, e.g., Federal Energy Administration, Report on Natural Gas Curtailments, 1975-76 Heating Season, issued on October 31, 1975. Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 2nd Session, Vol. I, pt. 2, at 1097 (1975).

Most serious, however, is the reference to criminal conduct on the part of Gulf and Texas Eastern. The judge found evidence of a conspiracy by Gulf and Texas Eastern to withhold gas from the interstate market until the price has been driven up in violation of Federal anti-trust laws. In view of the public losses and injury resulting from the interstate gas shortage, the FPC's decision to institute an administrative hearing must be seen as a serious error.

The selection of an administrative proceeding by the Commission instead of court action effectively closed off any possibility of meeting the needs of Texas Eastern's customers during the 1975-76 winter. Moreover, the administrative process commenced on November 7, 1975, shows little promise of reaching a final conclusion prior to the onset of winter in 1976.

Reacting to the agency's conduct, Congressman Andrew Maguire, a member of the Subcommittee, told the Chairman of the FPC:

My only problem is I don't know why the commission does not act in such a clear situation. If it is not going to act here, I don't know when it is ever going to act. On page 46 of your testimony you say, "To a large extent, enforcement is accomplished through the respective parties enforcing contract rights." This case makes a mockery of that statement in my judgment.⁴⁰

The FPC's manifest distaste for enforcing gas producers' delivery obligations is not limited to Gulf. The Commission's reluctance to enforce producer delivery obligations and the policy expressed in Opinion No. 539 is demonstrated by the inconsistent and equivocal testimony on this issue by the FPC's Chairman, Richard L. Dunham, before the Subcommittee.

Order No. 539 states that it was a *reiteration* of the Commission's policies with respect to the enforcement of the requirements of the Natural Gas Act *as they relate to deliverability*. Order No. 539 clearly states that natural gas producers have obligations arising from the Natural Gas Act with respect to deliverability (mimeo at 9). Nowhere does the order indicate that producer delivery obligations for certificates issued prior to Order No. 539 are any different from those issued after the promulgation of Order No. 539.

Chairman Dunham's testimony before the Subcommittee suggests that the Commission, as now constituted, does not believe that all certificates issued by the Commission to a natural gas producer authorizing the sale of natural gas are for a fixed or determinable quantity of gas. For example, Chairman Dunham testified ". . . when you say to enforce the contracts, that does not necessarily mean that all of the contracts prior had a specific volumetric condition in them which we can enforce."⁴¹ Chairman Dunham, however, also testified that for "most" certificates "there are deliverability obligations."⁴² Switching again, Chairman Dunham said "most of them or a great part of them are not specific in terms of the amount of volumes delivered in any particular period of time."⁴³ And Chairman Dunham added "so we are

⁴⁰ Hearings on Regulatory Reform Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 2d Session, Vol. II, at 297 (1976).

⁴¹ *Id.*, at 276. See also 273.

⁴² *Id.*, at 275.

⁴³ *Id.*, at 273.

in a position of trying to enforce the contract where there are no specific conditions in many cases of which we can enforce.”⁴⁴

Chairman Dunham's position appears confused and does not comport with earlier statements from the Federal Power Commission. As previously noted, by letter of July 18, 1975, Chairman John N. Nassikas advised the Subcommittee on Oversight and Investigations that “*all certificates issued by this commission to a natural gas producer authorizing the sale of gas is (sic) for a fixed quantity of gas to be computed in accordance with the terms of the particular sales contract which is the basis of the application*” (emphasis supplied).

When asked what mechanisms the Commission had established to enforce Order No. 539, Chairman Dunham responded that “We do monitor *all* contracts to see under our certificates the extent to which they are being followed” (emphasis supplied).⁴⁵ However, Chairman Dunham testified later that the Commission monitors “now basically only when there is a problem that arises.”⁴⁶

Chairman Dunham testified that the Commission commenced the Form 108 procedure because the Commission did not have the information required to determine whether or not producers were maintaining deliverability.⁴⁷ However, the Chairman subsequently said “but if you are suggesting that once the Form 108 is received and . . . analyzed, verified, summarized, etc., that will be the end of the line and then [we will] have a specific sum upon which we know those contracts require in terms of deliverability, I think that probably will not be the case.” He added, “I don't want to give the impression that once 108 is completed . . . that . . . we will know exactly how many cubic feet of gas must be delivered under those contracts.”⁴⁸

Finally, he testified that “[t]o a large extent, enforcement is accomplished through the respective parties enforcing contract rights.”⁴⁹ However, Chairman Dunham's predecessor at the FPC, John N. Nassikas, testified before the Subcommittee on Oversight and Investigations, in reference to enforcement of contract obligations: “I don't really think that the pipelines have done enough and I think they should do more.”⁵⁰ Mr. Richard A. Solomon, a former General Counsel at the FPC, testified that it would be “unrealistic to expect producer regulation to be enforced by a pipeline that is in desperate shape for gas and that is at the mercy of the producers who are either going to give them new supplies of gas or not give them new supplies of gas. You are looking to the wrong people.”⁵¹ Clearly, Chairman Dunham's reliance on the pipelines to enforce producer delivery obligations is misplaced.

⁴⁴ *Id.*

⁴⁵ *Id.*, at 272.

⁴⁶ *Id.*, at 275.

⁴⁷ *Id.*, at 274, 266 and 294.

⁴⁸ *Id.*, at 275.

⁴⁹ *Id.*, at 266.

⁵⁰ Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session, Vol. 1, Pt. 2, at 1193 (1975). See also Hearings on Regulatory Reform Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session, Vol. II, at 209-15 (1975) regarding Transcontinental Gas Pipelines refusal, despite severe shortages on its system, to support the FPC's efforts to enforce producer delivery obligations.

⁵¹ Hearings on Regulatory Reform Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session, Vol. II, at 225 (1975).

Enforcement of producer delivery obligations is not necessarily limited to instances of violation of certificates. Under present statutory authority, the Commission has no power to compel production of natural gas unless gas reserves are dedicated for sale in interstate commerce or unless there is a violation of a certificate, rate schedule or contractual responsibility.⁵² If gas is not so dedicated, the Commission cannot compel a producer to explore for new reserves or to develop and sell gas from its present reserves.⁵³ The FPC readily admits though that "(t)here may be gas not under contract being withheld from dedication, uncommitted gas which we [the FPC] can do nothing about."⁵⁴ In fact, our February 1976 Report on Mobil Oil Corporation's Grand Isle 95 Field concluded that Mobil's rejection of an FPC certificate, thus reducing the supply of gas available to two interstate pipelines severely pressed to serve customers, constituted an intentional withholding of supplies from the interstate market.⁵⁵

Having acknowledged that producers not obligated to deliver under a certificated contract, may be withholding gas, former Chairman John N. Nassikas stated that if such withholding has caused a natural gas emergency that "... we [the FPC] should have legislation that would empower us [the FPC] to compel those deliveries of gas . . ."⁵⁶ Testifying at a later date, Chairman Richard L. Dunham, who is not a lawyer, stated that the FPC had not requested authority to prevent the withholding of natural gas not under certificated contracts. He contended, without citing any legal authority, that such authority "would run into constitutional problems."⁵⁷

Although Chairman Dunham subsequently abandoned his constitutional argument,⁵⁸ the Commission has not asked support from the Department of the Interior's Geological Survey which has the responsibility to assure the diligent development of the Nation's gas reserves on the outer continental shelf. Neither, significantly, has the Commission requested Congress furnish authority to prevent withholding of gas from the Federal domain not yet under FPC certificated contracts.

The urgent need for enforcement of producer delivery obligations by the FPC is dramatically underscored by a Subcommittee study which showed that more than half of the gas wells in the Gulf of Mexico are producing at less than their maximum rate of production.⁵⁹ This study established that out of a sample of 133 natural gas

⁵² Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session, Vol. I, pt. 2, at 1617 (1975).

⁵³ *Id.*, at 1629. See also Hearings on Regulatory Reform Before the Subcommittee on Order and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 2nd Session, Vol. II, at 277 (1976).

⁵⁴ *Id.*, at 1626.

⁵⁵ Mobil Oil Corporation: Failure to Deliver Natural Gas to the Interstate Market, Report by the Subcommittee on Oversight and Investigation of the House Committee on Interstate and Foreign Commerce, 94th Congress, 2nd Session (1976). This report shows that the FPC staff attempted to initiate an FPC proceeding against Mobil for "deliberately and intentionally withholding supplies of gas from the interstate market." The FPC, however, rejected this attempt.

⁵⁶ Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session, Vol. I, pt. 2, at 1626 (1975).

⁵⁷ Hearings on Regulatory Reform Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 2nd Session, Vol. II, at 278 (1976).

⁵⁸ *Id.*, at 279.

⁵⁹ Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 2nd Session, Vol. III, at 220-32 (1976).

wells in the Federal Outer Continental Shelf, 68 wells, more than half the sample, were producing at less than 80 percent of their MPR (Maximum Production Rate) ⁶⁰ some were as low as 12.2 percent of MPR. The average of these wells was 58.9 percent of MPR.

The FPC's failure to enforce producer delivery obligations is contrary to its statutory responsibilities and approaches willful disregard of its obligations under the law. The Subcommittee concurs with the nine members of the House Interstate and Foreign Commerce Committee, who wrote to the Commission as follows.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., August 12, 1976.

Hon. RICHARD L. DUNHAM,
Chairman, Federal Power Commission,
Washington, D.C.

DEAR CHAIRMAN DUNHAM: The Federal Power Commission has the obligation and the statutory authority under the Natural Gas Act and its certificates of public convenience and necessity to insure that the public receives adequate supplies of gas. In this connection, we wish to express our grave concern over the Commission's July 30, 1976, Order No. 539-B regarding the Commission's enforcement of natural gas producer delivery obligations.

Section 7 of the Natural Gas Act provides that a certificate authorizing *service* shall be issued upon a finding that the applicant is "able and willing to properly . . . perform the *service* proposed" and that the proposed service is or will be required by the present or future public convenience and necessity. The specific quantity of gas to be delivered by a producer is part of the certificated "service" which the Commission finds meets the present and future public convenience and necessity.

Section 7(b) of the Natural Gas Act states that no natural gas company shall abandon *any* service without the prior permission and approval by the Commission.

A reduction in the quantity of gas delivered by a producer is a reduction of "any service" and hence constitutes a partial abandonment of service requiring prior Commission approval *Panhandle Eastern Pipe Line Co. v. Michigan Consolidated Gas Co.*, 177 F. 2d 942, 945 (CA6, 1949).

On October 14, 1975, former Chairman Nassikas advised the Subcommittee that ". . . all certificates issued by this Commission to a natural gas producer authorizing the sale of gas are for a fixed quantity of gas to be computed in accordance with the terms of the particular sales contract which is the basis of the application" (emphasis supplied). It is the Commission's responsibility to determine if natural gas producers are delivering the fixed quantity of gas to pipelines that their FPC certificates require.

Natural gas producer sales certificates issued by the Commission normally do not set forth a stated daily delivery volume. Rather, these certificates provide that the daily delivery obligation of a producer will be determined by a ratio of the recoverable reserves contained under the acreage that the producer has dedicated to the performance of the contract.¹

The Commission has acknowledged that natural gas producers are *not* delivering the minimum quantity of gas to the pipelines that the producers' FPC certificates require. When asked at a hearing of the Subcommittee on Energy and Power of the House Committee on interstate and Foreign Commerce on October 24, 1975, "isn't it a fact that a considerable number of rate schedules are now not making their minimum daily contract quantity?" The Commission's Deputy General Counsel responded "I would say that is a fact."²

⁶⁰ The United States Department of the Interior Geological Survey Outer Continental Shelf Order No. 11 defines Maximum Production Rate (MPR) as "the approved maximum daily rate at which oil may be produced from a specified oil well completion or the maximum approved daily rate at which gas may be produced from a specified well completion."

¹ Hearings on Long-Term Natural Gas Issues Before the Subcommittee on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., at 5 (1975).

² *Id.*, at 8.

The Commission, however, does not know how many gas producers are not meeting their delivery obligations. When asked at that same hearing "approximately what percentage or how many [FPC rate schedules] are not making their daily contract quantities?" The Commission's Deputy General Counsel answered "... I don't think we know."³

In an apparent effort to cure these deficiencies, on October 14, 1975, the Commission issued Order No. 539 which reiterated the Commission's authority and intention to enforce natural gas deliverability obligations by producers under FPC certificates. According to Commissioner Smith "Order No. 539 . . . does not change the law as to supply and deliverability obligations, but, rather, it reiterates what the statutory and decisional law now provides."⁴

Order No. 539 directed that natural gas companies comply with all natural gas deliverability requirements to meet, *inter alia*, certificated quantities of natural gas. Order No. 539 promulgated Section 2.83 of the Commission's General Policy and Interpretations which provided, *inter alia*, that "the *certificated minimum daily delivery obligation* of the seller (1) shall be determined in accordance with applicable provisions specifically set forth in sellers contract unless otherwise changed by the certificate authorization, (2) shall be without regard to any contractual reservations contrary to the certificate authorization, (3) and shall remain in full force and effect unless and until changed by appropriate certificate authorization amendment based upon Applicant's full documentation of, *inter alia*, the reasons for any such proposed amendment, the sales production history, the amount of remaining connected reserves of Applicant dedicated under the contract and the status of Applicant's nondeveloped reserves dedicated under the contract." The Commission also required that if a party has not secured an appropriate certificate amendment and there are circumstances resulting in the delivery of a lesser quantity of natural gas than any certificated delivery obligation, that the party file a verified report setting out the circumstances of such lesser deliveries and the corrective actions which the party proposes to undertake in order to meet any experienced delivery deficiency. In addition, each producer receiving an FPC certificate was required to report the results of all reserve determinations or subsequent reserve redeterminations to the Commission.

On December 17, 1975, the Commission issued a Notice of Proposed Rulemaking proposing a new FPC Form No. 108 for the purpose of accumulating data in a usable form necessary to identify the rate schedules which were underproducing. This order specified the need to identify rate schedules that are not meeting their minimum delivery obligations and acknowledged the relevance of reserve estimates to a determination of minimum delivery obligations.

The Commission's recently issued Order No. 539-B abandons the natural gas producer delivery obligation set forth in Order No. 539. Order No. 539 required natural gas producers to deliver a fixed quantity of natural gas which was termed the producers' "certificated minimum daily delivery obligation." This volume was a ratio of the producer's recoverable reserves under the acreage dedicated to its contract. Order No. 539-B abandons this delivery standard and substitutes in its place a "prudent operator" standard. The Commission says it will henceforth use the prudent operator test to judge the service obligations of producers under its certificates. The Commission's abandonment of its standard in Order No. 539 is contrary to Commissioner Smith's representation that Order No. 539 reiterated what the statutory and decisional law now provides. In addition, Order No. 539-B eliminated Section 2.83 of the Commission's General Policy and Interpretations.

A more amorphous and ambiguous delivery standard could hardly be found. A prudent operator in an industry which has repeatedly demonstrated its indifference to anything but its own financial self interest is a standard so devoid of meaningful content for consumer interests that its use by the FPC is tantamount to an abdication of its statutory responsibilities.

The Commission has known since 1971 that natural gas producers are not meeting their minimum daily delivery obligations.⁵ But the Commission has not identified which producer rate schedules are deficient in this regard, so that the producers' delivery obligations could be enforced.

³ *Id.*

⁴ *Id.*, at 96.

⁵ *Id.*, at 97.

In addition, this Subcommittee has conducted innumerable investigations of the failure by producers to deliver natural gas committed to the interstate market.

A July 1975 Preliminary Report by the Subcommittee on delays in natural gas production by Cities Service Oil Company concluded that Cities Service had purposefully delayed commencing the workover of its wells, and that this delay resulted in disruptions of deliverability of substantial quantities of gas needed by consumers during the critical winter heating season.

An October 1975 Report by the Subcommittee on declining deliverability at the Garden City, Louisiana field operated by Exxon Corporation and Quintana Petroleum Corporation found that the producers had failed to undertake diligently the work projects necessary to maintain deliverability of natural gas from the field and establish production from untapped reservoirs. In addition, the Subcommittee's Report recommended that the FPC should forthwith commence proceedings and issue orders requiring producers to undertake work projects and take any other steps necessary to maintain deliverability at contractual and certificate levels, in accordance with the legal obligations of the producers.

A November 1975 Report by the Subcommittee on the declining deliverability at the Bastian Bay Field Louisiana found that Getty Oil Company and Tenneco, Inc., the two producers of the field, had not undertaken sufficient drilling to maintain natural gas deliverability.

The urgent need for vigorous enforcement of producer delivery obligations by the Commission is dramatically underscored by a recent Subcommittee staff study which showed that more than half of the gas wells in the Gulf of Mexico are producing at less than their maximum rate of production. This study established that out of a sample of 133 natural gas wells in the Federal Outer Continental Shelf, 68 wells—more than half the sample—were producing at less than 80 percent of their MPR (Maximum Production Rate); some were as low as 12.2 percent of MPR. The average of these wells was 58.9 percent of MPR.

The Commission has failed to follow up on these reports, to expand them, and to look into the entire question of why natural gas producers are not delivering the gas that they can deliver.

The Commission's retreat, demonstrated by the issuance of Order No. 539-B, with respect to the enforcement of producer delivery obligations is shocking. Instead of vigorously enforcing the Natural Gas Act by requiring gas producers to deliver their certificated minimum daily delivery volumes, the Commission has dedicated itself to urging that the Natural Gas Act's regulatory provisions be amended to deregulate the price of natural gas. As proof of the need to deregulate the price of natural gas, the Commission points to the shortage of natural gas it has in large measure abetted.

The responsibility for any economic dislocation and harm resulting from any future "shortage" of natural gas rests largely with the Commission's failure to enforce natural gas producers' delivery obligations. Despite an abundance of evidence indicating more than an insignificant amount of withholding of natural gas supplies, the FPC has not taken effective action.

The Commission's recent actions approach the level of willful disregard of its obligations under the law.

Sincerely,

HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce.

JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigations.

JOHN D. DINGELL,
Chairman, Subcommittee on Energy and Power.

WILLIAM BRODHEAD,
Member of Congress.

TOBY MOFFETT,
Member of Congress.

RICHARD OTTINGER,
Member of Congress.

ANDREW MAGUIRE,
Member of Congress.

HENRY A. WAXMAN,
Member of Congress.

PHILIP SHARP,
Member of Congress.

Instead of enforcing the Natural Gas Act by requiring gas producers to deliver their certified volumes, the FPC has dedicated itself to urging that the Natural Gas Act's regulatory provisions be gutted to permit an uncontrolled increase in the price of natural gas to consumers.⁶¹ As proof of the claimed need to deregulate the price of natural gas, the Commission points to the shortage of natural gas.

While there is substantial evidence indicating more than an insignificant amount of withholding of natural gas the Commission has failed to pursue this evidence or enforce producer delivery obligations. The FPC remains insensitive to the threatened economic dislocation and harm resulting from recent curtailments of deliveries.

B. ABANDONMENT OF COST-BASED PRICING

In July 1976, the Commission granted natural gas producers the largest price increase in the history of natural gas price regulation. The impact on consumers is estimated to be \$1.5 billion a year.⁶²

The Commission set a price for "new" natural gas of \$1.42 per Mcf, a figure fully 184 percent higher than the 50-cent price deemed adequate only 18 months before.⁶³ Notwithstanding that the FPC has sought to prescribe rates on the basis of economic factors unrelated to cost,⁶⁴ the Commission repeatedly stated in Opinion No. 770 that the \$1.42 rate is "fully cost-based and reasonable."⁶⁵ Noncost factors were examined, said the Commission, only "... to insure that the cost-based rate is just and reasonable."⁶⁶

Yet, analysis of the Commission's methodology, and subcommittee hearings held a month after the decision, established that if costs were considered they were not *actual* costs as required by law,⁶⁷ but hypothetical costs based on untested assumptions.

The Federal income tax allowance granted by the Commission is an example. No less than 43 cents of the \$1.42 price is intended to reimburse natural gas producers for Federal income tax payments incurred as a result of repeal of the oil and gas depletion allowance. For that purpose the Commission *assumes*, in a hypothetical costing model, that producers would be paying the full 48 percent statutory corporate income tax rate, after accounting for selected deductions and credits.

But the facts belie the assumption. No evidentiary hearings were held by the Commission in which gas producers were required to produce actual tax returns.⁶⁸ No studies were conducted by the Commission to determine the true effect of repeal of the depletion allow-

⁶¹ FPC News Release No. 21184, issued March 4, 1975.

⁶² Opinion No. 770, *infra* note 63, at 5.

⁶³ Opinion No. 770, *National Rates for Jurisdictional Sales of Natural Gas Dedicated to Interstate Commerce on or After January 1, 1973, for the Period January 1, 1975 to December 31, 1976*, issued July 27, 1976.

The lower 50 cent rate, was prescribed in Opinion 699-H, issued December 4, 1974. *Just and Reasonable National Rates for Sales of Natural Gas From Wells Commenced on or After January 1, 1973 and New Dedications of Natural Gas to Interstate Commerce on or After January 1, 1973*.

⁶⁴ *Supra* note 18.

⁶⁵ Opinion No. 770, *supra* note 63 at 1-2.

⁶⁶ *Id.*

⁶⁷ *Federal Power Commission v. United Gas Line Co.*, 386 U.S. 237, 244-45 (1967), and discussion, *infra* note 82.

⁶⁸ Hearings on Federal Power Commission Biennial Rate Decision Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess., at Tr. 56, 1976.

ance.⁶⁹ If studies had been conducted, the Commission would have discovered that (1) the assumed 48 percent tax rate is wholly unrealistic;⁷⁰ and (2) credit for repeal of the depletion allowance should amount to, at most, a fraction of that allowed.

The Commission had ample warning of the hazards of such assumptions. In 1968 the Commission itself said "It is an essential precept of regulatory law that no income tax allowance should be permitted except for taxes actually paid."⁷¹ Because of the producers' failure to come forward with actual tax returns, the Commission in that 1968 decision was constrained to admit that "Without such returns available to us, we cannot begin the required analysis which will establish the extent of the industry's tax liability, if any, in the light of the provisions in the revenue laws which would reduce or eliminate the tax liability."⁷²

The Commission firmly adhered to that same policy in subsequent decisions, including its Opinion No. 699-H in December 1974, when the Commission reasoned that "the complex nature of Federal tax laws negate any simple calculation of a Federal tax liability and require consideration of the producer's tax returns in order to consider the timing relationships between investment expenditures, the expensing of intangible drilling costs, and jurisdictional sales."⁷³ In that 1974 decision, however, the Commission invited producers to seek specific relief for taxes actually paid, upon submission of "copies of their Federal income tax returns and such supporting schedules as are necessary to permit the Commission to determine the appropriate amount of a Federal income tax allowance, if any."⁷⁴ Significantly, no producer came forward.⁷⁵

This traditional "show me" policy was not disregarded by the Commission's staff as it approached Opinion No. 770. Both the FPC's Office of Economics and its Producer Rate Division specifically excluded any income tax provision in their proposed rates of 58 cents and 62 cents per Mcf respectively. As the Office of Economics put it:

"We believe that producers should be compensated for income taxes actually incurred. However, we know of no factual basis for estimating income taxes incurred on natural gas operations in the past or those to be incurred in the future."⁷⁶

The Office of Economics went on to recommend that "the Commission take action to obtain an evidentiary basis for the justification of an income tax allowance."⁷⁷ But the Commission did nothing of the kind.

The view of the Office of Economics was not altogether unanimous. The head of that department, Dr. Haskell P. Wald, felt that due to repeal of percentage depletion, "a tax allowance equal to 16 percent of

⁶⁹ *Id.*, at Tr. 49.

⁷⁰ *Id.*, at Tr. 50-51, and discussion following.

⁷¹ Opinion No. 546, Area Rate Proceeding *et al.* (Southern Louisiana Area), Docket No. AR61-2 *et al.*, at 581.

⁷² *Id.* at 587-88.

⁷³ Opinion No. 699-H, *supra* note 63, at 35.

⁷⁴ *Id.* at 36.

⁷⁵ Testimony, Dr. John Galloway, Special Assistant, Subcommittee on Oversight and Investigations, *Hearings, supra* note 68, at Tr. 11.

⁷⁶ Comments of the Office of Economics of the Federal Power Commission, National Rates for Natural Gas, Docket No. RM 75-14 (July 29, 1975), at 3.

⁷⁷ *Id.* at 4.

the selling price" should be allowed,⁷⁸ or about half of the 43 cents per Mcf tax allowance finally agreed to by the Commission. A Library of Congress study requested by the Subcommittee determined that "the legislation repealing percentage depletion is not sufficient to account for the new income tax treatment [in Opinion 770]—and in fact, falls far short of accounting for it."⁷⁹ The Library of Congress study did not offer an opinion as to what would constitute a proper tax allowance on grounds that the Library knows "of no data which can be used to establish any sort of industry wide effective tax rate for natural gas producers."⁸⁰

What is known, however, is that in the recent past, although before repeal of percentage depletion, the largest oil and gas producers in the United States paid Federal income taxes amounting to roughly 5 percent,⁸¹ a far cry from the 48 percent adopted by the Commission. The reduction in taxes actually paid by these producers is attributable to such deductions as the foreign tax credit (which negates much of the industry's U.S. tax liability), and to write-offs associated with domestic operations not within the FPC's direct regulatory purview, so-called "nonjurisdiction tax benefits."

The Commission failed to take such tax benefits into account in Opinion No. 770, despite the United States Supreme Court's 1967 warning that the Commission has "the power and the duty . . . to limit cost of service to *real expenses*" (emphasis supplied). According to the Supreme Court, this meant that "the Commission has the power to reduce cost of service, and hence rates, based on the application of non-jurisdictional losses to jurisdictional income."⁸²

In its opinion, the Commission refused to take into account some completely "jurisdictional" tax benefits. In times of industry growth for example, increased exploration and development expenditures can defer a significant portion of a producer's current tax liability. A memorandum from the head of the FPC's Office of Economics, noted "it is easy to construct examples which show that IDC (intangible drilling cost) expensing will permit the deferral of income taxes for an extended period of years."⁸³ But the Commission sidestepped this issue by stating its inability to assess accurately the tax benefits of expected short term growth and by suggesting the lack of any long term growth in the natural gas industry. The opinion does not provide for a reduction in the 43 cent tax allowance even in the event of future increased drilling. Thus, the Commission's stated inability to accu-

⁷⁸ Memorandum from Haskell P. Wald, Chief, Office of Economics, FPC, to Chairman Dunham, July 13, 1976, p. 2, copy on file with Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce.

⁷⁹ Memorandum from Library of Congress to Rep. John E. Moss, Aug. 26, 1976, p. 1, appearing in appendix. [*Hearings, supra* note 68.]

⁸⁰ *Id.*, at 3.

⁸¹ "Analysis of Tax Data of Seven Major Oil Companies." Committee on Government Operations, United States Senate, November 1974, appearing in pertinent part in appendix of *Hearings, supra* note 68.

The study found that seven major oil companies paid an effective U.S. income tax rate of 5.36 percent in only one case, and appreciably less than 5 percent in all other cases, from 1968 through 1972.

⁸² *Federal Power Commission v. United Gas Pipe Line Co.*, *supra*, 386 U.S. 237, 245. See *supra* note 67.

In a closely related decision, Opinion No. 749-C, rendered by the Federal Power Commission eight days prior to issuance of Opinion No. 770, the *United Gas Pipeline* case is quoted, but without the critical word "duty." See *Hearings, supra* note 68, at Tr. 53.

⁸³ Memorandum from Haskell P. Wald, Chief, Office of Economics, to Deputy Chief, Bureau of Natural Gas, May 12, 1975, at 2, appearing in *Hearings, supra* note 68.

ately assess tax benefits is used as an excuse not to account for them at all. Yet when it came to tax costs, the Commission used its inability to accurately assess actual tax liabilities to the opposite effect—as an excuse to grant producers credit for the full statutory, and merely theoretical, rate of 48%. The producers, of course, benefit in both instances.

If the tax allowance of 43 cents in the new \$1.42 rate is the single largest factor, the Commission's concept of productivity "is the cornerstone of the analysis used to determine the cost for 'new' gas."⁸⁴ As explained *infra*⁸⁵ productivity for a given year is calculated by dividing that year's non-associated gas reserve additions by the total successful gas footage drilled for that year. An understatement of reserve additions, therefore, would yield an artificially low productivity figure, which in turn would result in increased producer profits at the expense of consumers.

An extensive discussion of the FPC's past reliance on reserve data furnished by the American Gas Association, an industry trade group, follows in case study C. In this case, however, the Commission did not depart from American Gas Association figures in setting the new \$1.42 rate despite their manifest infirmities.⁸⁶

Closely related to productivity, and as important to the new rate, is the cost of drilling. Here too, the FPC relied on industry-generated data, the great bulk of which was obtained from the Joint Association Survey (JAS), a report compiled and published by the American Petroleum Institute.

JAS data has not always enjoyed such favor with the Commission. Eleven years ago, in its first area rate case, the Commission refused to accept JAS data, saying:

"We agree with the presiding examiner that the JAS statistics should not be used to decide this issue. The presiding examiner has pointed out that the companies included in the JAS were not selected on a random basis, and that filling out and returning the JAS questionnaire was voluntary. The results thus reflect a considerable amount of self-selection. Due to the method of selection there is no assurance that the sample is characteristic of the industry as a whole."⁸⁷

In a comment on Opinion No. 770, Haskell Wald, head of the FPC's Office of Economics, was uneasy over the Commission's reliance on JAS data. "The Commission," he said, "has never examined the JAS statistical sample, nor have we investigated the JAS methodology for weighing the sample data to obtain the national averages,"⁸⁸ a fact which the Commission's chairman, Richard L. Dunham, confirmed in recent subcommittee hearings.⁸⁹

Relying on faulty data to determine costs is questionable enough, but in addition the Commission completely omitted consideration of a sizable benefit to producers. Commissioner Smith, in his dissenting opinion, emphasized the majority's failure to consider "advance pay-

⁸⁴ Opinion No. 770, *supra* note 63, at 83.

⁸⁵ See Case Study C, "Lack of Reliable Information for Regulation," *infra* at —.

⁸⁶ *Id.* at —.

⁸⁷ Claude B. Atkman, *et al.*, North Central Oil Corp., *et al.*, Docket No. CI 60-435, *et al.* (Permian Basin I), at 51.

⁸⁸ Memorandum from Haskell P. Wald, Chief, Office of Economics, to Chairman Dunham, July 13, 1976, p. 2 appearing in *Hearings supra* note 68.

⁸⁹ *Hearings, supra* note 68 at Tr. 107.

ments"—a term referring to the billions of dollars in interest free loans made to producers from pipeline companies since 1970. The pipelines, in turn, are allowed by the FPC to include interest for these loans in their rate base. The result is a mechanism whereby consumers are required to contribute huge amounts of capital to support natural gas producers.

Of the over \$2 billion in advance payments currently outstanding, Commissioner Smith said that "it would seem reasonable to gauge the effects of this massive infusion of consumer contributed cost free capital to the producing segment of the industry . . ." ⁹⁰ Nor is the free interest any mean amount. According to Commissioner Smith, producer savings are \$300 million per year. ⁹¹

The Commission's own staff was not unaware of the consequences of ignoring advance payments. Commenting on a draft of Opinion No. 770, the FPC's chief accountant, L. H. Drennan, noted:

The advance payments provide a cost free source of funds for producer exploration and development for substantial periods of time, up to several years in some cases.

The draft opinion cost calculations are premised on the assumption that a producer's cost of capital is 15 percent. To the extent that advance payments are used as a source of capital, such premise is not correct. ⁹²

Mr. Drennan went on to state that although the FPC did not have data available to estimate reasonably the impact of advance payments, "It certainly would lower the rate." ⁹³

Beyond these cost and benefit factors, and the Commission's failure to realistically assess them, the Subcommittee's staff analysis of Opinion No. 770, and subsequent hearings, revealed a definitional problem of major proportions. Ostensibly, the \$1.42 rate applies to "new natural gas," defined as that which is sold "from wells commenced on or after January 1, 1975" or that which is sold "pursuant to contracts executed on or after January 1, 1975, for the sale of natural gas in interstate commerce where such gas has not previously been sold in interstate commerce." ⁹⁴ The overriding rationale for the increased price for this gas is to afford producers sufficient incentive to explore for "new gas."

Yet under questioning at the subcommittee's hearings on Opinion No. 770, Chairman Dunham acknowledged that new wells drilled into previously discovered reservoirs would qualify for the new rate. ⁹⁵ Indeed, ". . . Opinion 770 makes no distinction between yet-to-be-discovered reserves . . . and reserves which are already known, identified, and even in production." ⁹⁶

The result is an overwhelming incentive to producers to convert "old gas" into "new gas" by drilling shallow and probably unnecessary developmental wells in known fields, rather than exploring for new, large-scale reserves. Not only does the producer enjoy windfall

⁹⁰ Opinion No. 770, *supra* note 63, Dissent, at 12.

⁹¹ *Id.* The practice of allowing new advanced payments contracts has ceased. However, outstanding contracts do not mature until 1980.

⁹² Memorandum from L. H. Drennan, Chief Accountant, to Chairman Dunham, p. 2, July 16, 1976, appearing in *Hearings*, *supra* note 68.

⁹³ *Id.* at 2.

⁹⁴ Opinion No. 770, *supra* note 63, at 2.

⁹⁵ *Hearings*, *supra* note 68, Tr. at 66-67.

⁹⁶ Testimony of Dr. Oscar Strongin, Special Consultant, Subcommittee on Oversight and Investigations, House Comm. on Interstate and Foreign Commerce, *Hearings*, *supra* note 68, Tr. 23-4.

profits from the conversion.⁹⁷ but the rationale of the price rise—to enhance exploration for truly “new” gas—fails.

If the Federal Power Commission harbors any doubt that its natural gas price regulation must be based on the true costs of exploration for, development and production of gas, plus a reasonable return on investment, despite an array of appellate court cases which say that,⁹⁸ then the Congress should make the mandate of cost-based rate regulation explicit.

No further congressional mandate should be required to compel the Commission to require empirical evidence, produced in open hearings, of the costs the Commission relies upon. Hypothetical tax costing models, assuming producer payment of statutory maximums; unchallenged industry generated data on reserves and drilling costs; complete omission of multi-billion-dollar cost-free capital benefits; and untested industry conduct in the face of the loosely defined applicability of the new rate—are a conscious disregard of the clear intent of Congress.

C. LACK OF RELIABLE INFORMATION FOR REGULATION

The Commission often does not have facts sufficient to constitute a reliable basis for regulation. To a large extent, FPC decisions are based on evidence supplied by special regulated interests and “[a] regulatory authority . . . whose information-gathering procedures cause it to receive significantly more and better information favorable to the regulated, will reach decisions that are excessively favorable to the special interests.”⁹⁹ Former Commission Chairman John N. Nassikas told the subcommittee on Oversight and Investigations that “[t]hroughout the past 5 to 6 years, this has been a very critical and crucial issue examined by the Commission as to what extent should we rely on industry figures, to what extent should we secure our own.”¹⁰⁰

The Commission possesses statutory authority to collect data from the natural gas companies it regulates. The United States Court of Appeals for the Ninth Circuit recently said that “while the regulatory and rate setting jurisdiction of the Commission is narrowly defined, Congress has given it broad authority to gather data which would in any rational way aid it in the performance of its statutory function.”¹⁰¹

The Natural Gas Act, however, limits the FPC’s authority to collecting data from those companies falling under its jurisdiction.¹⁰² Accordingly, the FPC seeks legislation which would broaden that authority to collect information with respect to *all segments* of the natural gas industry, whether or not subject to FPC jurisdiction.¹⁰³

⁹⁷ *Id.*, Tr. at 26. Dr. Strongin, in one example, suggested that a producer’s rate of return, projected on an annual basis, would amount to fully 437 percent.

⁹⁸ *Supra* note 19.

⁹⁹ R. Noll, Reforming Regulation 80 (1971).

¹⁰⁰ Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session, Vol. I, pt. 2, at 1197 (1975).

¹⁰¹ *Union Oil Co. v. FPC*, — F.2d —, — (Ninth Cir. No. 75-2891, decided June 2, 1976) Slip Op. at 6.

¹⁰² The Federal Power Act, 16 U.S.C. § 825j, on the other hand, allows the FPC to gather data about intrastate activities from companies engaged solely in intrastate activities.

¹⁰³ The FPC’s recommendation on this subject was included in S. 1880, 84th Congress; S. 2259, 86th Congress; S. 1603 and H.R. 6963, 87th Congress, 1st Session; and in Section

A major flaw in the regulatory process is that the Commission relies on natural gas reserve data supplied by industry in setting the price for natural gas sold at the wellhead, or so-called producer rates. These data largely are unverified and unaudited.

The source of the data is almost exclusively the American Gas Association (AGA), a trade association and specifically its Committee on Natural Gas Reserves. This AGA committee was established in 1945 to publish an annual estimate of proved natural gas reserves in the United States.¹⁰⁴ The annual estimates are reported by State or geographic regions. They do not divulge data on individual producer's gas reserves, as such data presumably are reported to AGA in confidence.

The Commission sets producer rates by computing the average cost of producing natural gas and adding a specified rate of return (currently, 17.72% on equity). Reserve data figure significantly in the cost of production: i.e. the FPC computes a unit cost for finding and producing each Mcf of new gas by dividing the amount of gas found each year (so-called proved additions) into the national cost of finding and producing gas.

The agency regards productivity as the cornerstone of the analysis used to determine the cost of new gas. Productivity is computed by dividing the volume of reserves added in the year by the number of feet drilled successfully in finding the new reserves. An increase in productivity, based largely on the increase in Mcf for that year, will lower the price to the buyer; a loss of productivity, associated with a relatively low volume of new found gas, will raise the price.¹⁰⁵ This formula contains an inherent incentive for the natural gas trade association to minimize its estimates of new gas found each year so as to protect or raise prices and profits for its members.

The FPC first used the AGA's reserve statistics in its Permian Basin proceeding in 1969.¹⁰⁶ The AGA gas reserve reports were selected by the Commission because they were a continuing series dating back

7 of S. 2744 and of H.R. 10866, 87th Congress, 2nd Session. The proposal was later introduced as a separate measure, S. 3343 and H.R. 12011, 87th Congress, 2nd Session, and Reintroduced as S. 1463 and H.R. 5867 in the 88th Congress; S. 1550 and H.R. 5871 in the 89th Congress; S. 1720 and H.R. 8548 in the 90th Congress; S. 3900, S. 4290 and H.R. 3668 in the 92nd Congress; and in the 93rd Congress as S. 1829 and H.R. 8257. See also Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session, Vol. I, pt. 2, at 1206 (1975).

¹⁰⁴ Natural Gas Reserves are defined by the American Gas Association as:

The Committee's definition of proved reserves defines the current estimated quantity of natural gas and natural gas liquids which analysis of geologic and engineering data demonstrate with reasonable certainty to be recoverable in the future from known oil and gas reservoirs under existing economic and operating conditions. Reservoirs are considered proved that have demonstrated the ability to produce by either actual production or conclusive formation tests.

The area of a reservoir considered proved is that portion delineated by drilling and defined by gas-oil, gas-water contacts or limited by structural deformation or lenticularity of the reservoir. In the absence of fluid contacts, the lowest known structural occurrence of hydro-carbons controls the proved limits on the reservoir. The proved area of a reservoir may also include the adjoining portions not delineated by drilling but which can be evaluated as economically productive on the basis of geological and engineering data available at the time the estimate is made. Therefore, the reserves reported by the Committee include total proved reserves which may be in either the drilled or the undrilled portions of the field or reservoir.

See also Hearings on Natural Gas Supplies Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. 1, pt. 2, at 359 and 366 (1975).

¹⁰⁵ "... the price set by the Federal Power Commission is inversely proportional to the amount of reserve additions discovered." Hearings on Natural Gas Supplies Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. 1, pt. 1, at 10 and 366 (1975).

¹⁰⁶ Permian Basin Area Rate Proceeding, 34 FPC 159 (1965).

20 years and because there were available no other comprehensive statistics on reserves.¹⁰⁷

Because reserve data count so much in FPC regulation of producer rates, the AGA's data and its procedural methods have warranted close scrutiny. In at least three instances, the AGA reports have been found inaccurate and misleading.

The first instance was in March 21, 1974, when the FPC released a staff study indicating a disparity in the data on offshore Louisiana natural gas reserve additions for 1971 and 1972. The aggregate AGA reserve addition figures for the entire South Louisiana area (more than 900 leases) were found to be approximately 1.7 Tcf less than the reserves found by the FPC staff to have been added in only 31 leases sold there December 15, 1970.¹⁰⁸

After this study was released, the Commission convened a public hearing to provide the AGA and other interested parties the opportunity to resolve this disparity. At this hearing the AGA claimed that its data was confidential and refused to supply the information necessary for the Commission to conduct a lease by lease comparison of the AGA's data with that of the FPC.¹⁰⁹ As a consequence, the Commission adjusted its calculations in setting producer rates by adding the 1.7 Tcf of natural gas underreported. The result was an increase in productivity from 485 to 494 Mcf per foot worth a saving of one cent per Mcf to the buyer.¹¹⁰

On the basis of this evidence, former Chairman John N. Nassikas urged that the agency obtain comprehensive information directly from the regulated industry rather than rely on AGA reserve figures in determining prices.¹¹¹ Chairman Nassikas described the FPC's methodology in using AGA reserve data as "adequate although far less than perfect. It has deficiencies that are gross . . ." ¹¹² According to Chairman Nassikas, the Commission should cease using AGA statistics in rate setting because "it is virtually impossible with our staff to conduct an independent analysis year by year of the reserves that are reported by the AGA." ¹¹³

On June 13, 1975, the Commission undertook to update its March 21, 1974, study. Chairman Nassikas said the FPC had ordered the new investigation "because we believe there may be more disparities." ¹¹⁴

On June 21, 1976, the Commission released its updated report on AGA reserve statistics.¹¹⁵ This report partially confirms Chairman

¹⁰⁷ Hearings on Natural Gas Supplies Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. 1, pt. 1, at 38 (1975).

¹⁰⁸ Hearings on Natural Gas Supplies Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. 1, pt. 1, at 233-34 (1975). Hearings on Natural Gas Supplies Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. 1, pt. 2, at 1615 (1975).

¹⁰⁹ Hearings on Natural Gas Supplies Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. 1, pt. 1, at 81 and 234 (1975). Hearings on Natural Gas Supplies Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. 1, pt. 2, at 1615 (1975).

¹¹⁰ Hearings on Natural Gas Supplies Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. 1, pt. 2, at 1073 (1975).

¹¹¹ *Id.*, at 1196.

¹¹² *Id.*, at 1197.

¹¹³ *Id.*

¹¹⁴ *Id.*, at 1613.

¹¹⁵ FPC. Staff Report on the Updated 31 Lease Investigation, Docket No. RM 75-14, (1976).

Nassikas' suspicions, as it states that : 1) "Based on the current study involving Gulf of Mexico 1971-1972 discoveries and ultimate reserves at year end 1974, staff concludes that the total nonassociated gas discovered in those two years is not accurately reflected in the AGA publication," and 2) "[a]s to the . . . reasonableness of the reserves estimates made by or reported to the AGA [by producers], we would conclude that the estimates in total are reasonable."¹¹⁶

The second investigation of AGA reserve data is contained in a staff report from the Bureau of Competition of the Federal Trade Commission (FTC).¹¹⁷

This FTC staff report offers strong evidence that the declining trend in reserves reported by the AGA since 1968 represents a concerted effort by producers, acting through the AGA, to influence the FPC to increase the price of natural gas sold at the wellhead. This report, by the FTC's Bureau of Competition, contends that natural gas companies, acting through the AGA, have submitted inaccurate and misleading reserve data to the FPC.¹¹⁸

On the basis of data submitted from companies, and an extensive FTC staff investigation, including interviews with members of the AGA, the staff of the Bureau of Competition concluded that the "AGA reserve reporting procedures are tantamount to collusive price rigging".¹¹⁹ The Director of the Bureau recommended that the FTC issue a complaint against the American Gas Association and 11 oil companies, charging that they have "violated Section 5 of the Federal Trade Commission Act by concertedly maintaining a deficient natural gas reserve reporting program which influences the price at which producers sell natural gas to interstate pipeline companies."¹²⁰

The FTC staff's recommendation was based upon the fact that the amount of natural gas reserves is a component in establishing the price for natural gas and that the price of gas varies inversely with the reserve figures. The FTC staff believed that because the gas producers and the AGA were the only source of reserve information for the FPC and because the producers have an incentive to lower their reserve figures in order to obtain a higher price from the FPC for their gas, the reporting system violated Section 5 of the Federal Trade Commission Act which prohibits "unfair methods of competition in commerce."

James T. Halverson, the FTC's Director of the Bureau of Competition, concluded that:

The evidence establishes that the members of the [AGA] South Louisiana Subcommittee, employees of the major producers in the area, gather each year at a meeting to submit and receive proved reserve estimates for natural gas which are aggregated and used by the FPC to determine the prices consumers eventually pay for natural gas. At this meeting, these representatives of the gas producers accept reserve estimates from each other without audit or review of the underlying raw reserve data which form the basis for the AGA estimates. The evidence received at investigational hearings further demonstrates the inconsistencies in the interpretation of the AGA definition of proved reserves . . .

¹¹⁶ *Id.*, at 1.

¹¹⁷ See *Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session, Vol. I, pt. 1, at 15-140 (1975).*

¹¹⁸ *Id.*

¹¹⁹ *Id.*, at 18.

¹²⁰ *Id.*, at 15.

These inconsistent interpretations . . . lead to inconsistent and unreliable reserve estimates by the AGA. The evidence shows that the AGA representatives are aware of these discrepancies in the application of the AGA definition when they meet for the purpose of preparing the AGA reserve estimates, yet there is not a single adequate safeguard in the system to ensure against use of biased or manipulated data.

Under these circumstances there is strong evidence of an unfair agreement, express or implied, by the gas producers to maintain and participate in this inadequate system . . .¹²¹

The Subcommittee held hearings in June 1975 regarding the reliability of AGA reserve data. The principal witnesses were attorneys from the FTC's Bureau of Competition who testified regarding their investigation of the American Gas Association natural gas reserve reporting system. The FTC staff alleged that the various deficiencies of the AGA reporting system "have produced inconsistent, unreliable, incomplete, and possibly manipulated statistics."¹²² Some of the deficiencies the FTC cited were the control of reserve reporting by major producers, the lack of audits of AGA reserve estimates, the absence of guidelines to be used by AGA subcommittee members and the inability of AGA subcommittee members to obtain all the reserve data which is needed.¹²³

Despite an abundance of evidence supporting the issuance of a complaint, the FTC declined on July 29, 1975, to issue the proposed complaint. Instead, the Commissioners returned the case to the staff for further investigation and directed that efforts to obtain court enforcement of seven outstanding subpoenas to producers be pursued.

The third investigation of the accuracy of AGA reserve figures was a Congressional investigation. Because of the FTC Bureau of Competition's conclusions and recommendations cited above, this Subcommittee issued subpoenas to seven gas producing companies and the American Gas Association to produce documents on natural gas reserve estimates.

Included among the documents subpoenaed from the AGA were individual field estimates for offshore South Louisiana for the years 1967 through 1974, as prepared by members of the South Louisiana reserve subcommittee.

The American Gas Association does not publicly report reserve information for individual fields. As noted, the AGA releases reserve data on a State or regional basis only. Offshore Gulf of Mexico is only one of 48 regions for which the AGA reports reserves on an aggregate basis.

The best way to test the accuracy of AGA reserve reporting system is to compare AGA reserve estimates with those prepared by an independent party. The United States Geological Survey reserve studies use essentially the same definition of reserves used by the AGA for the Gulf of Mexico Federal outer continental shelf.¹²⁴ The United

¹²¹ *Id.*, at 751-52.

¹²² *Id.*, at 70.

¹²³ The American Gas Association's reserve reporting system will be further examined in a subsequent Subcommittee report.

¹²⁴ Testimony of Dr. John Galloway, Special Assistant, Subcommittee on Oversight and Investigations, Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, 94th Cong., 2nd Sess., Vol. III, at 10-11, states: "... [T]he terms 'proved' reserves as used by industry and 'measured' reserves as used by government [the USGS included] 'are essentially synonymous' * * * measured reserves, as used by the USGS, are basically equivalent to 'proved reserves' as employed by industry and the AGA." See also testimony of Dr. Vincent E. McKelvey, Director, U.S. Geological Survey, at 16.

States Geological Survey, however, cannot compare its reserve estimates for the Federal Outer Continental Shelf with those published by the American Gas Association because the only AGA reserve data publicly available are the regional reserve totals for the 48 American Gas Association areas. American Gas Association reserve estimates for the Federal Outer Continental Shelf are not identified in those reports.

By virtue of its access to United States Geological Survey reserve data and its subpoenaed American Gas Association reserve estimates for offshore South Louisiana, the Subcommittee was in the unique position of being able to examine comparable data from the two separate sources: United States Geological Survey and American Gas Association.

The comparison revealed that the United States Geological Survey total for 153 offshore South Louisiana fields was 23.473 Tcf of gas, whereas the AGA total for the same fields was 14.704 Tcf. The American Gas Association total was thus 8.769 Tcf or 37.4 percent less than that determined by the United States Geological Survey.¹²⁵ This comparison clearly supports the Federal Trade Commission Bureau of Competition's finding that gas reserves are substantially underreported by the American Gas Association.

In recognition of the limitations of the American Gas Association natural gas reserve statistics and for the purpose of improving its ratemaking procedures, on February 25, 1975 the Commission promulgated Order No. 526 which requires all natural gas companies and their affiliates or subsidiaries to file annually on Form 40 uniform information on proved domestic natural gas reserves. The Commission estimates that "approximately 90 percent of the Nation's total natural gas reserves would be reported through this system."¹²⁶

The Commission contends that the data supplied on Form 40 "will provide a means of evaluating the veracity of reported gas reserves which in turn have a direct relationship to rates. Securing these data directly from companies under oath and subject to audit will establish a more reliable and credible basis for prospective ratemaking. Additionally, the gas reserves information will provide the *first* systematic and independent basis for comparison with industry estimates of reserves as reported by the American Gas Association" (emphasis supplied).¹²⁷

The FPC's attempt to elicit uniform reserve information directly from natural gas producers was challenged in Federal court by several natural gas producers.¹²⁸ In an opinion issued on June 2, 1976, the United States Court of Appeals for the Ninth Circuit vacated and remanded to the FPC its order requiring the filing of Form 40.¹²⁹ on

¹²⁵ Hearings on Natural Gas Supplies Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong. 2nd Sess., vol. III, at 6-14 (1976).

¹²⁶ Hearings on Natural Gas Supplies Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. I, pt. 2, at 1080 (1975).

¹²⁷ FPC 1975 Annual Report at 38 (1976).

¹²⁸ Appeals were filed by Union Oil Co. of Calif., Getty Oil Co., Ashland Oil Inc., Eason Oil Co., Gulf Oil Corp., Mobil Oil Corp., Texaco Inc., Cabot Corp., Skelly Oil Co., General American Oil Co. of Texas, Burmah Oil & Gas Co., Tenneco Oil Co., Exxon Corp., Cities Services Oil Co., Phillips Petrol. Co., Mitchell Energy Corp., The Superior Oil Co., Sabine Royalty Corp., Continental Oil Co., and AMOCO Prod. Co.

¹²⁹ *Union Oil v. FPC*, — F.2d —, — (Ninth Cir., No. 75-2891, decided June 2, 1976).

the grounds that the factual premises upon which the FPC decision to issue Form 40 rested were not supported by substantial evidence as required by Section 19 of the Natural Gas Act.¹³⁰

As early as 1969, the Commission staff had attempted unsuccessfully to obtain detailed lease-by-lease reserve and cost information from natural gas producers.¹³¹ The Commission staff requested the data in order to audit American Gas Association's reserve estimates.¹³² As the natural gas producers vigorously opposed the request, the Commission ultimately chose not to press them.¹³³

Thus, the Commission waited until 1975 to seek to secure the reserve information its staff had requested in 1969. In addition, when the Commission finally promulgated its Form 40 it did so on a factual basis that was not supported by sufficient evidence. The FPC's failure to pursue this particular line of inquiry for six years may be explained in part by the largely unsuccessful experience of its sister agency, the Federal Trade Commission, in attempting to subpoena producer reserve information.¹³⁴ A Federal Trade Commission official testified that "you can't underestimate the producer resistance to giving data in a sufficiently detailed manner so that it could be audited."¹³⁵

The Subcommittee believes that the producer's reluctance to divulge their gas reserve data is inconsistent with their responsibilities both under the Natural Gas Act and as leasees of resources on public lands.

In other respects the FPC lacks facts needed to constitute a reliable basis for regulation. One area is the lack of accurate curtailment data. The FPC attempts to allocate supplies of natural gas among customers and to estimate future supplies without current knowledge of curtailment of deliveries to end use customers or the availability of fuels that can substitute for natural gas.

Under the Natural Gas Act the FPC can obtain data only from those companies falling under its jurisdiction. Consequently it cannot secure information directly from end users of natural gas.¹³⁶ Although the Federal Energy Administration collects this information from all suppliers of natural gas which are beyond the jurisdiction of the Commission, the Federal Energy Administration has determined that portions of the data are confidential and should not be divulged.¹³⁷ Hence, the Commission has been forced to operate without this data.

The Commission needs information also about so-called optional and emergency gas sales. In recent years, the Commission has issued various orders providing for emergency gas sales at unregulated rates for 60-day periods and an optional certificate giving producers the option to

¹³⁰ 15 U.S.C. § 717r(b).

¹³¹ Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 1st Session, Vol. I, pt. 1, at 218 (1975).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Chapter 3, Federal Trade Commission for a detailed account of this attempt to obtain information.

¹³⁵ Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. I, pt. 1, at 237 (1975).

¹³⁶ Hearings on Natural Gas Supplies Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. I, pt. 2, at 1125 (1975).

¹³⁷ See GAO, Report on the Need For The Federal Power Commission to Evaluate The Effectiveness of the Natural Gas Curtailment Policy (1975).

sell dedicated quantities of gas for longer periods at rates higher than previously permitted. Emergency gas sales mean the consumer pays premium prices. A report prepared by the United States General Accounting Office concluded that the "FPC needs to obtain complete and accurate data on the volume and price of gas brought to the interstate market by its emergency gas sales program to adequately assess their effectiveness. The orders implementing emergency sales either were not enforced or required only submission of estimates when the sale began. As a result, FPC relied on incomplete and inaccurate data in its decision making processes."¹³⁸ There are indications that the Commission is now taking action to improve its data on emergency sales.¹³⁹

The Commission has not accumulated reliable data on natural gas sales contracts. Since the Commission has not promulgated Form No. 108, it cannot organize such information in a form necessary to enforce producer obligations to deliver. The United States General Accounting Office has noted that "[g]enerally FPC does maintain cumulative data on the volume of gas under contract and the expiration dates involved."¹⁴⁰ Moreover, the United States General Accounting Office noted that the FPC did not sufficiently verify the data in hand.¹⁴¹

In conclusion, Commission decisions are based too much on evidence supplied by the companies it regulates or on no data at all. In the case of the establishment of producer rates, the Commission's exclusive reliance on American Gas Association reserve estimates has probably meant that consumers have paid excessively for the fuel.

The Commission should secure its own data, or independent data, from the companies it regulates. The FPC also should have statutory authority to obtain information from companies it does not regulate. When the FPC must rely on data supplied by industry, it should obtain the information under oath and audit and verify the data to assure its accuracy. The consuming public should not have to pay the unwarranted costs of decisions rendered by the Commission on the basis of inadequate or inaccurate data supplied exclusively by those who stand to profit from their use.

D. LACK OF CONSUMER INTEREST REPRESENTATION

The FPC's excessive reliance on evidence supplied by special regulated interests is compounded by the absence of effective representation of consumer interests in its procedures.¹⁴² Consumer representation before the Commission is essential because "The positions that make up the set of alternative policies considered by a regulatory agency are determined in part by the interest groups mobilized to present their case to the agency and, if a decision is unacceptable, to appeal the decision outside the agency."¹⁴³

¹³⁸ GAO, Report on the Need for Improving the Regulation of The Natural Gas Industry And Management Of Internal Operations at 14 (1974).

¹³⁹ GAO, Report on the Actions Taken By the Federal Power Commission On Prior Recommendations Concerning Regulation of the National Gas Industry and Management of Internal Operations (1976).

¹⁴⁰ GAO, Report on Reliable Contract Sales Data Needed for Projecting Amounts of Natural Gas that Could Be Deregulated at 3 (1975).

¹⁴¹ *Id.*, at 15.

¹⁴² Hearings on Regulatory Reform Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. II, at 1-247 (1975).

¹⁴³ R. Noll, *Reforming Regulation* at 94-95 (1971).

Because the regulated industry possesses overwhelming advantage in resources of information, experience, time, and talent, which they bring to bear in the administrative process, the regulated companies tend to bias Commission decisions. The public utilities are well represented at the FPC and, if necessary, in the courts by lawyers, economists, and accountants. Furthermore, the costs of their representation are allowed in the computation of utility rates. The rate-paying consumer pays for the utilities' advocacy. Few of the public utilities' customers, in contrast, have the resources to represent their interests even when they are aware of them.¹⁴⁴

The Commission has a legal obligation to protect consumers.¹⁴⁵ The FPC contends that "[o]ver the years, the staff of the Federal Power Commission has accepted its legal obligation to provide forthright presentation and advocacy of the consumer viewpoint before the Commission and the Courts."¹⁴⁶ The Commission concludes that its "existing procedures are working well and that no new or additional measures are needed . . . to afford ample *opportunity* for public and consumer participation" (emphasis supplied).¹⁴⁷ However, it does concede that "[t]he task of consumer representation in agency regulatory proceedings relating to interstate electric and natural gas utility service is, of necessity, highly specialized and demands the services of knowledgeable experts who can be depended upon to bring all facets of a particular problem to the attention of the agency."¹⁴⁸

The FPC position that consumers have ample opportunity to participate misses the point. *Opportunity* is not equivalent to ability. Although FPC rules may lend the appearance of citizen participation, in fact "that appearance at best is cursory."¹⁴⁹

The quality of public and consumer participation before the FPC "boils down . . . to money."¹⁵⁰ "Regulations which pay lip service to the right of citizen and public interest intervention are meaningless unless coupled with the provision of adequate financial assistance to make the right of standing more than an illusion."¹⁵¹ As the agency admits, representation before the FPC is highly specialized: it demands the services of knowledgeable experts. The time of these experts is valuable; considerable sums are needed for their participation in proceedings before the FPC to be effective. Few, if any, consumers individually or collectively, possess the financial resources to afford regular and extended representation before the FPC.

The FPC staff cannot effectively represent the consumer interest. The FPC deludes itself when it alleges that its staff "has accepted its legal obligation to provide forthright presentation and advocacy of the consumer viewpoint before the Commission and the Courts."¹⁵²

¹⁴⁴ FPC Chairman Dunham testified that there was "a dearth of actual direct 'consumer' involvement" in some of the FPC's most important cases. Hearings on Regulatory Reform Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., vol. II, at 256 (1976).

¹⁴⁵ *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

¹⁴⁶ Hearings on Regulatory Reform Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., vol. II, at 260 (1976).

¹⁴⁷ *Id.*, at 261.

¹⁴⁸ *Id.*, at 260.

¹⁴⁹ Hearings on Regulatory Reform Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. II, at 193 (1975).

¹⁵⁰ *Id.*, at 192.

¹⁵¹ *Id.*, at 191.

¹⁵² *Id.*, at 260.

First, the FPC staff does not have the right to present any viewpoint before the courts. If the FPC decides a case in favor of a regulated company and against the recommendations of its staff (not an infrequent occurrence), the staff cannot challenge the FPC's decision. Representation cannot be sufficient or complete without the right to appeal FPC decisions to the courts. The FPC knows that any decision it renders in favor of the regulated industry will stand if its staff is the only party in opposition to the regulated industry position. In such a situation, the FPC is not above dismissing or completely ignoring the staff presentation and argument.¹⁵³

Second, contrary to the testimony of FPC Chairman Dunham, the FPC staff represents the public interest, not the consumer interest. The two concepts are not identical. The FPC's Deputy General Counsel testified that:

... the Federal Power Act and the Natural Gas Act require representation of public interest as opposed to representation of the interests of users of service. In many instances, *these interests are not identical* (emphasis supplied).¹⁵⁴

Representation of the public interest involves balancing "the need for reasonable rates for consumers against the need of the utility to maintain its financial integrity."¹⁵⁵ On the other hand, representation of the consumer viewpoint is not encumbered by public utility considerations.

Third, "the workload of the Federal Power Commission has increased tremendously in the last several years. Comparing fiscal years 1972 and 1975 . . . the staff of the Commission increased 12.6 percent, the number of filings with the Commission increased 112 percent and the number of major decisions and orders issued increased 340 percent."¹⁵⁶

To the extent that the Commission staff represents consumers, its efforts in their interest are diluted, if not altogether negated, by the demands to give time to other work. Although the FPC knows this, the agency has not tried to employ staff to fulfill its obligation to consumers.

Regulation works best when all interests are well represented. Several options have been suggested to achieve a fair degree of consumer representation at the FPC.

First, the Commission should have an office of consumer counsel. This proposal could be satisfied by an Agency for Consumer Advocacy which would act before all Federal regulatory agencies, including the FPC, and the courts. A consumer counsel would give consumers at least one voice in regulatory proceedings before the Commission and, if necessary, in the courts.

Second, the Commission should provide financial assistance to consumer interest intervenors. Funds for this purpose might be assessed upon the utilities. Even though the utilities would recoup this assessment through their rates, consumers would have the benefit of paying

¹⁵³ See, e.g., *South Texas Natural Gas Gathering Co.*, Opinion No. 683, 51 FPC 231 (1974).

¹⁵⁴ Hearings on Electric Utility Rate Reform and Regulatory Improvement Compilation of Statements of Witnesses before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., at 927 (1976).

¹⁵⁵ *Id.*

¹⁵⁶ Hearings on Regulatory Reform Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce 94th Cong. 2d Sess. vol. II at 251 (1976).

for the presentation of *both* viewpoints rather than paying only for their adversaries.¹⁵⁷

Third, the Commission should establish an intervenor assistance center to provide information on all aspects of FPC practice and procedure. Rather than wait passively for requests for information, this center should reach out to assist those who require aid. Alone, this proposal would not assure consumer representation before the FPC; it will be effective only if linked to a program for providing consumer groups with the means to intervene and participate in FPC proceedings.

Fourth, the Commission should hold regional hearings in the geographic area affected by the proposed regulatory action. Such deployment can facilitate participation before the FPC by consumers now effectively barred from participation in FPC proceedings by the expense associated with travel to Washington, D.C.

Fifth, the Commission staff should be strengthened and authorized to appeal FPC decisions.

The foregoing changes in agency procedures will improve the regulatory process by countering the advantages which favor the regulated industry before the FPC.

E. THE FPC'S PROCEDURES WORK TO THE DETRIMENT OF CONSUMERS AND REGULATED UTILITIES

Regulation by the FPC should be as expeditious as possible, consistent with due process. A series of field hearings conducted by the Subcommittee addressed the local manifestation of major national issues confronting the electric power industry and consumers.¹⁵⁸ The testimony indicated that the FPC's cumbersome and complicated procedures worked to the detriment of consumers and occasionally to the detriment of the regulated utilities, also. Administrative delays reduce the ability of the Commission to respond to changing conditions, becloud utilities' financial condition, frustrate consumer and public interest groups, and impose on consumers over an extended period of time rates which may be excessive and discriminatory.

The difficulties created by such procedures may be illustrated within the context of the agency's regulation of rates for the electric utility industry.

... [The] electric power industry in the contiguous United States includes nearly 3,500 systems which vary greatly in size, type of ownership, and range of functions. It is made up of four distinct ownership segments—investor-owned companies, non-Federal public agencies, cooperatives, and Federal agencies—and is unique among world systems in the diversity and complexity of its organization. Most systems serving large population centers are vertically integrated, i.e., they perform the functions of generation, transmission, and distribution. In contrast, there are many systems which provide distribution exclusively, and others that generate some power while relying on firm purchases to meet part of their requirements. These are mostly smaller systems and are largely in the municipi-

¹⁵⁷ Hearings on Regulatory Reform Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. II, at 148, 185, and 196 (1975).

¹⁵⁸ These hearings were held in Hartford, Connecticut on November 21, 1975; Newark, New Jersey on November 24, 1975; Las Vegas, Nevada on June 12, 1976 and Richmond, Indiana on July 16, 1976. See Hearings on Regulatory Reform Before the Subcomm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce 94th Cong., 1st Sess. vol. II (1975).

pial and cooperative segments. The extent to which the smaller generating systems can remain viable will depend in part on their obtaining additional supplies of power at costs which reflect the economies of large-scale generating plants now being constructed.¹⁵⁹

Despite the fact that interstate wholesale electric power sales regulated by the FPC make up only about 7.3 percent of all power company sales in dollars,¹⁶⁰ many small electric companies depend on interstate supplies. Under state control, they may be squeezed between rates authorized by FPC and those permitted by the State; i.e. a price squeeze occurs when wholesale electric rates are higher than residential and industrial retail electric rates. The squeeze can prevent the buyer from competing with a wholesale seller which may be serving the same or competitive territory.

The Supreme Court held in the *Conway* case¹⁶¹ that the Federal Power Act forbids unreasonable differences between wholesale and retail rates. It directed the FPC to consider the presence of rate discrimination when it sets wholesale rates.

Because of the Commission's cumbersome and complicated procedures, however, consumers and the purchasing utilities may be required to pay rates which may be both excessive and discriminatory for extended periods.

By statute¹⁶² the Commission has discretion to suspend rate increase requests for between 1 day and 5 months. At the end of the period, prior to final decision on the rate increase, the requested rates go into effect, subject to a refund should any part of the increase be disallowed.

Proceedings to decide rate applications at the Commission can be extraordinarily time-consuming. Currently, the FPC has before it more than 200 applications representing more than \$600 million of pending electric rate increases.¹⁶³ It is not unusual for proceedings to require 3 or 4 years. The FPC Chairman has likened the situation to being "on a treadmill and going backward."¹⁶⁴

It has been contended that "a substantial amount of the inefficiency of an agency is intentional—serving to raise the costs of fighting regulatory battles . . .".¹⁶⁵ Whether or not delay is intentional, the Commission's extraordinarily lengthy deliberations benefit the regulated utilities.

One delaying factor is the FPC's practice of allowing regulated companies repeatedly to amend their filings. This unrestricted practice has been described as the "fast paper shuffle."¹⁶⁶ To reduce the Commission's massive backlog, the filing of amendments and updated figures or testimony should be restricted effectively by the Commission.

Some utilities have several applications for rate increases pending before the FPC at the same time, with all increases pending a

¹⁵⁹ Statistical Materials on the Electric Utility Industry prepared for the use of the Subcomm. on Energy and Power and the House Comm. on Interstate and Foreign Commerce 94th Cong., 2d Sess., at 6 (1976).

¹⁶⁰ S. Breyer and P. MacAvoy, *Energy Regulation by the Federal Power Commission* at 11 (1974).

¹⁶¹ *FPC v. Conway Corp.*, _____ U.S. _____, (No. 75-342, dated June 7, 1976).

¹⁶² Section 205(e) of the Federal Power Act, 16 U.S.C. § 824(d).

¹⁶³ Testimony of FPC General Counsel in Las Vegas, Nevada at 12.

¹⁶⁴ Hearings on Regulatory Reform Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., vol. II, at 251 (1976).

¹⁶⁵ R. Noll, *Reforming Regulation*, at 45 (1971).

¹⁶⁶ Hearings on Regulatory Reform Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. II, at 141 (1975).

final decision.¹⁶⁷ This practice, described as "pancaking," exacerbates the economic burdens on consumers. The Commission's procedures should prohibit pancaking.

FPC procedural decisions and delays can severely damage power distributors who buy electricity from wholesale suppliers. If a retailer of electricity is unable to adjust rates to reflect increased wholesale costs without significant delay, the financial loss can be ruinous. The period the FPC sets for suspending wholesale rate increases is critical because it affects the exposure of the retailer to this kind of a price squeeze. The FPC does not consider this price squeeze when it sets suspension periods.

Regulatory lag, the fast paper shuffle, pancaking, and suspension practices all contribute to infliction of rates that can be excessive, discriminatory, or ruinous. The practice of allowing rates to go into effect before they are thoroughly investigated, tested in a public hearing, and ruled upon by the FPC should be eliminated. It would then be in the best interest of the regulated utility for cases to be decided expeditiously so that the utility could begin to collect the new rate. In this manner, the burden of FPC delays, industry delaying tactics, and multiple rate filings would be shifted from consumers to the regulated utilities. Similarly, electricity retailers would not be exposed to a price squeeze for an indeterminate period. In addition, expedited decisions would facilitate consumer representation. A regulated utility could collect a fair rate within a reasonable period of time if the FPC would render a final decision on a rate application within 10 months of filing. These actions by the FPC would be responsive to the needs of both utility consumers and regulated utilities.

V. Consolidation of Federal Energy Regulatory Functions

At present no single Federal agency has authority and responsibility to formulate a comprehensive energy policy with the objective of efficient and productive use of the Nation's energy resources. Authority over energy uses and sources for the United States government is severely fragmented; there is a multiplicity of agencies involved in one or more facets of energy regulation. Careful reorganization of energy regulatory functions is needed to consolidate those economic regulations that affect major sources and uses of energy, to apply national policy in cohesive and coordinated programs, and to reduce the waste of effort and expertise resulting from extravagant and unproductive duplication.

Since natural gas and oil are more or less interchangeable fuels, decisions on one fuel affect the other. Decisions on either with respect to imports, production uses, and prices should be issued by one independent regulatory agency. The reorganization of energy regulatory and information gathering functions should eliminate or minimize the fragmentation of responsibility and accountability for energy, along with duplication of effort, inconsistencies, delays, and extravagance.

The overlap between the FPC and other Federal agencies in natural gas data collection is exceptionally wasteful. The Federal Energy Administration (FEA), the FPC, the Securities and Exchange Commis-

¹⁶⁷ The utilities testifying before the Subcomm. on Oversight and Investigations which had multiple rate increase applications on file included Nevada Power Co. and the Indiana & Michigan Electric Company.

sion (SEC), the Federal Trade Commission (FTC), and the Department of the Interior all collect data on natural gas reserves.

The FEA's Oil and Gas Reserves Study, completed in 1973, cost \$3 million.¹⁶⁸ The FPC has prepared a National Gas Reserve Study released in 1973 at a cost of approximately \$630,000 and 37,279 man-hours.¹⁶⁹

Natural gas reserve data is reported also to the SEC. Certain forms adopted by the SEC for registration of securities under the Securities Exchange Act require information on natural gas reserve estimates relevant to registrant's operations or properties. The SEC spent \$93,000 and 4 man-years on natural gas reserve studies for fiscal year 1976.¹⁷⁰

The Federal Trade Commission has conducted an extensive staff investigation of allegedly collusive reporting of natural gas reserve information by natural gas companies through the American Gas Association, at a cost to date of about \$230,000 and 23,390 man hours (11¼ man years).¹⁷¹

The United States Geological Survey of the Department of the Interior prepares natural gas reserve studies at a cost per year of about \$650,000 and 23 man-years.¹⁷² In addition, the Bureau of Mines assembles data relating to reserve of minerals, mineral fuels, surface stocks, inventories, and production and consumption of petroleum natural gas and coal.

The bifurcation of natural gas regulatory matters between the FPC and the FEA is the source of costly delay and conflict.

In July 1975, the FEA and the FPC sent questionnaires (FEA Form G-101-Q-0 and FPC Form 69) to approximately 1700 companies that deliver natural gas to end-use customers requesting data about gas deliveries, curtailments, the customer's capabilities to use alternate fuels, and sales under firm and interruptible contracts. The purpose of the survey was to develop estimates of the extent of natural gas curtailments to the end-use customers of these companies. The FEA based its shortage projections on this data.

The two different questionnaires were employed by FPC and FEA respectively to obtain information from natural gas companies under FPC jurisdiction and from all other companies.

The FPC staff considered that the information obtained by both agencies was essential to its consideration of the extent of the alleged natural gas shortage. An FPC staff letter of October 20, 1975 to FEA states:

FPC staff believes that the information contained in the [FEA] form constitutes the only data available regarding the adequacy of fuels alternate to

¹⁶⁸ Testimony of Dr. Oscar Strongin at Hearings on Final Report on Oil and Gas Resources, Reserves, and Productive Capacities Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2nd Sess., (1976) at Tr. 45.

¹⁶⁹ Federal Power Commission Memorandum of August 26, 1976, from Gordon K. Zareski, Planning and Development Division Chief of the Bureau of Natural Gas to William D. Braun, Counsel, Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce.

¹⁷⁰ Data supplied to the Subcommittee on Oversight and Investigations by Mr. Andrew J. Rothman, Director of Public Affairs, Securities and Exchange Commission.

¹⁷¹ Data supplied to the Subcommittee on Oversight and Investigations by Mr. Daniel C. Schwartz, Assistant Director for Evaluation, Bureau of Competition, Federal Trade Commission.

¹⁷² Data supplied to the Subcommittee on Oversight and Investigations by Mr. Price McDonald, Petroleum Engineer, Conservation Division, United States Geological Survey, United States Department of the Interior.

natural gas. Staff believes that such data constitute an important ingredient for energy policy formulation. It seems . . . that an update of this information would be especially relevant since the information in the prior report . . . does not represent the most recent information regarding fuel shortages prior to entering the 1975-76 winter heating season.¹⁷³

An FPC internal staff memorandum of October 29, 1975, states:

The information regarding identification of end users (FPC Form 69 and FEA Form G101-Q-0) claiming alternate fuel deficiency is also vital to FPC staff in evaluating the overall impact of natural gas curtailments and is covered in the more specific request dated October 20, 1975, for access to these data through direct computer terminal.¹⁷⁴

Any doubt that the end use information accumulated by the FEA was not essential to the FPC in discharging its statutory duties and responsibilities is removed by an examination of the content of a December 17, 1975, letter from the Secretary of the FPC to the FEA's Deputy Administrator John Hill, which said:

The subject data contain essential information regarding natural gas curtailments and alternate fuel consumption by ultimate end users and natural gas distribution companies not subject to specific data gathering authority of the Commission and are not available from any other government or private source.

Thus, the data contained in Form G-101-Q-0 are indispensable to FPC in carrying out its duties and responsibilities under the Natural Gas Act, and to provide information to the states, the Congress and to the general public. These data have particular significance to the continued conduct of natural gas curtailment proceedings and policy planning by the Commission.

Despite the importance of the FEA-held data to the effective discharge of the FPC's statutory responsibilities and to a realistic assessment of the dimensions of the alleged natural gas shortage, the FEA repeatedly refused to supply this information to the FPC without first obtaining a promise by the FPC to keep it confidential.¹⁷⁵ An internal FPC staff memo indicates that, at an October 24, 1975 meeting between FEA and FPC staff, the FPC staff was told:

The question of the confidentiality of detailed information held by FEA regarding propane availability was discussed at length. FEA staff indicated that information involving the monthly supply and demand balance of each major propane supplier is definitely considered as proprietary and cannot be divulged to FPC staff even under a request pursuant to the Freedom of Information Act. Likewise, the confidentiality of alternate fuel demand information on a company by company basis as contained in FEA Form G101-Q-0 may be considered as proprietary according to FEA staff.¹⁷⁶

Toward the close of the winter heating season, the FEA Deputy Administrator John Hill advised the FPC by letter of February 20, 1976, that it would release its data to the FPC pursuant to Section 11(d) of the Energy Supply and Environmental Coordination Act of 1974. Section 11(d) provides:

Such information [i.e., energy information obtained from a person which would if made public divulge methods or processes entitled to protection as trade secrets or other proprietary information of such person, which is to be treated as confidential in accordance with 18 U.S.C. 1905] shall not be deemed confidential for purposes of disclosure, upon request, to . . . (2) . . . the Fed-

¹⁷³ Letter of October 20, 1975 from FPC Assistant General Counsel George P. Lewnes to FEA Director, Office of Data Services Albert H. Linden, Jr., at 1.

¹⁷⁴ FPC Memorandum dated October 29, 1975 from Joseph J. Solters, Case Manager, Bureau of Natural Gas to George P. Lewnes, Assistant General Counsel, at 1.

¹⁷⁵ FPC Memorandum dated October 24, 1975, from Joseph J. Solters, Case Manager, Bureau of Natural Gas, to George P. Lewnes, Assistant General Counsel, at 1.

¹⁷⁶ *Id.*

eral Power Commission . . . when necessary to carry out [its] duties and responsibilities under this and other statutes. . . .

The FEA's intransigence regarding this matter deprived the FPC of information it required to carry out its responsibilities under the Natural Gas Act. This lack of coordination between the FEA and the FPC was not in the public interest.

The fragmentation of energy responsibilities among Federal agencies has forced one agency to drop an inquiry because another agency had previously considered a related matter.

In 1970, the Federal Trade Commission (FTC) began an investigation into the quality of reporting of proved natural gas reserves by the American Gas Association (AGA), a trade association of natural gas producers and distributors. As part of its investigation, the FTC issued subpoenas to 11 natural gas producers. Seven producers opposed these subpoenas in court proceedings. The District Court found the FTC's subpoenas to be improper because they sought to duplicate activities of the FPC which had resulted in a finding by the FPC that the AGA's estimates of natural gas reserves were accurate.¹⁷⁷ On appeal, the United States Court of Appeals for the District of Columbia circuit held that the FTC was precluded or collaterally stopped from relitigating the issue of the accuracy of proved natural gas reserves and hence limited the breadth of the FTC's subpoenas.¹⁷⁸

The consolidation of energy regulatory and information gathering functions in an independent regulatory agency would substantially reduce undesirable duplication of activities and would prevent the possibility of one agency effectively blocking investigation of an energy issue by another Federal agency.

VI. Conclusions and Recommendations

The indispensable first step in regulatory reform is to insure that powers of regulatory agencies such as the FPC are used effectively in the public interest, as intended by the Congress. In the case of the FPC, the immediate need is for a Commission which is committed to upholding the law. No amount of reform, resources, or amendment will succeed in improving regulation if the regulators have a preconceived ideological commitment to undermine the process. The Commission more than any other regulatory agency we have studied demonstrates the need for better quality regulators.

The FPC's lassitude toward enforcement of producer delivery obligations under the Natural Gas Act is more easily identified than remedied. So long as the Administration continues to select Commissioners on the basis of their antipathy toward regulation, it is not realistic to expect the FPC's statutory mandate will be discharged. We recommend that Commissioners be selected who are in accord with the Commission's statutory mandate.

Legislation should be enacted which would require that the FPC enforce producers' obligations to deliver natural gas. This could be

¹⁷⁷ The FPC's finding on this issue has been refuted by the FPC staff updated 31 lease investigation, *supra*, at 404-05 and the United States Geological Survey reserve studies, *supra*, at 406-07. In addition, the court was in error in precluding the FTC from investigating fully the AGA's conduct regarding the reporting of all natural gas reserve data.

¹⁷⁸ *FTC v. Texaco*, 517 F.2d 137 (D.C. Cir. 1975).

accomplished by amending Section 20(a) of the Natural Gas Act (15 U.S.C. § 717S) to provide that the FPC *shall* (rather than "may in its discretion") bring enforcement actions in court. Alternatively, legislation could mandate administrative enforcement in lieu of court action.

Legislation should also be enacted which would give the FPC the power to compel the production of natural gas from the Federal domain prior to its dedication for sale in interstate commerce. Natural gas on Federal lands is being withheld from interstate commerce. The FPC should have statutory power to compel delivery of such gas supplies.

Legislation should be enacted which would give the Commission the authority to regulate the sale of natural gas in intrastate commerce. Regulation of the intrastate market is essential in order to remove the current incentive for gas producers to sell their gas in the more lucrative intrastate market where the price of gas is strongly influenced by the artificially high price of oil set by the international cartel of petroleum exporting countries commonly referred to as OPEC. Commission authority to set intrastate as well as interstate gas prices would restore price parity to natural gas markets and would help alleviate the supply imbalance currently being experienced by the interstate market.

The Commission should establish a division responsible for assuring the complete enforcement of the provisions of the Natural Gas Act, including delivery obligations. This enforcement division should recommend actions directly to the Commission, as a measure of its independence and freedom from undue internal influences.

Vigorous congressional oversight can also ameliorate the Commission's disinclination to discharge its regulatory responsibilities effectively.¹⁷⁹ Several witnesses before the Subcommittee indicated that Congressional oversight spurred the Commission into various actions.¹⁸⁰ Legislation should be considered which would increase the accountability of the Commission to the Congress by providing a satisfactory structure for Congressional oversight and for a suitable flow of information to the Congress. As an element in this structure, we recommend a monthly report by the Commission detailing its enforcement activities.

¹⁷⁹ Hearings on Natural Gas Supplies Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. I, pt. 2 at 1183, 1190 (1975); Hearings on Regulatory Reform Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., vol. II, at 209, 225 (1975); Order No. 539, issued October 14, 1975, slip op. at 1.

¹⁸⁰ Congressional oversight, however, does not assure responsible Commission action. A July 1975 Preliminary Report by the Subcommittee staff on delays in natural gas production by Cities Service Oil Company concluded that Cities Service had purposely delayed commencing the workover of its wells, and that this delay disrupted deliveries of substantial quantities of gas. The Subcommittee referred this matter to the Department of Justice for consideration of prosecution of Cities officials for possible perjury and obstruction of justice violations. While this matter was the subject of an FPC investigation, the Commission made no recommendation to the Justice Department with respect to this matter. In addition, in a matter related to the FPC's ongoing investigation, a Subcommittee investigation of the substance of FPC testimony rendered by an official of the Mitchell Energy Corporation indicated possible violations of Federal statutes prohibiting perjury and the obstruction of justice. The FPC failed to protect its own processes from abuse by neglecting to take administrative action on the evidence adduced by the Subcommittee and by refusing to support the Subcommittee in its referral to the Department of Justice for their prosecutive consideration. See Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2nd Sess., Vol. III, at 185-228 (1976).

As to the Commission's abandonment of cost-based producer rate regulation, we recommend that legislation be enacted which would require that the Commission adhere to cost-based rate regulation.

To remedy inadequate consumer representation and Commission staff resources, we recommend the creation of an office of consumer counsel at the Commission and the infusion of sufficient funds to enable consumer groups and the Commission staff to participate effectively in Commission proceedings. In addition, we recommend that the Commission staff be accorded the right to institute judicial review of Commission decisions.

We urge that the office of consumer counsel be outside the Commission hierarchy because otherwise it would suffer the disadvantages of the Commission's staff, which is susceptible to manipulation by officials who are less than enthusiastic regulators. The tactics of these officials are varied but include replacement of conscientious employees with other staff members on selected cases. We recommend that such abuses be eliminated so that the staff can faithfully perform its mission. Strong and responsible Commission leadership and vigilant congressional oversight can eliminate such practices.

The Commission can regulate effectively only if it possesses accurate data. As the industries regulated by the Commission have an economic interest in the data that they present, we recommend that the Commission secure its own data under oath. In the event that the Commission must rely on industry data, we recommend that it be granted statutory authority to collect data from all segments of the natural gas industry, with resources to audit and verify the accuracy so that the data will not be tainted by bias.

A careful reorganization of energy regulatory functions should be undertaken that would consolidate in an independent regulatory agency existing economic regulatory and information gathering functions affecting energy, give more coherence and greater coordination to the nation's energy policy and programs, and remove wasteful duplication of effort and expertise resulting from the multiplicity of agencies involved in energy regulation. Since natural gas and oil are substitutable fuels and decisions pertaining to one fuel impact on the other, legislation should be enacted which would consolidate oil and gas regulatory and information gathering matters, including Federal lease management, in an independent regulatory agency. The energy regulatory functions should remain insulated from programs designed to promote the development of energy resources and research, public education, or advocacy associated with such promotion. These promotional functions should remain within the Executive Branch. Coordinated energy policy and planning functions would remain a necessary part of both an independent energy agency and an Executive Branch agency.

So that the Commission's procedural and administrative roadblocks to effective regulation may be eliminated, we recommend that the Commission receive funding sufficient to eliminate regulatory delays attributable to a lack of resources. We recommend early consideration of legislative and administrative action to streamline the Commission's regulatory process, simplify its procedures, prevent requested rate increases from going into effect until they are found to be just and

reasonable by the Commission, and restrict repeated updated filings and multiple rate filings by the regulated industry. We recommend that final Commission decisions on rate increases applications be issued within 10 months of filing.

The need to insure that the Commission discharge its statutory obligations to protect the American public effectively and in a timely manner is all the more urgent in this time of uncertainty as to future resources of energy. The major difficulties in the industries regulated by the Commission have not been caused solely or even primarily by regulation. Those who claim that Commission regulation has failed are only partially correct. The regulatory mandate has been mismanaged and betrayed by a Commission that has consciously disregarded its responsibilities. What is required, along with the specific reform we propose, is a new dedication to the principles of regulation in the public interest by those entrusted to uphold the law.

FEDERAL REGULATION AND REGULATORY REFORM

PART IV

CONGRESS AND THE REGULATORY AGENCIES

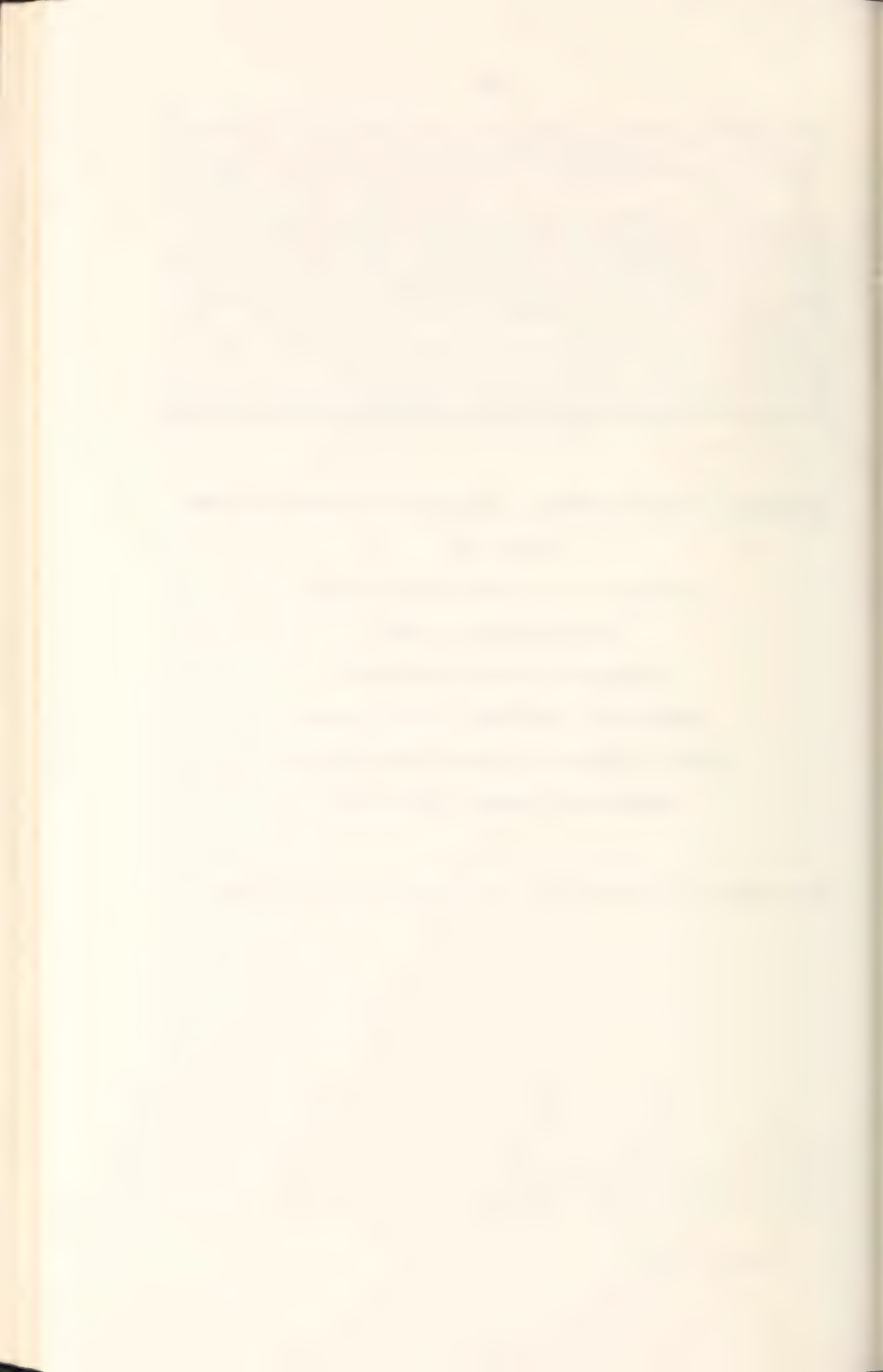
QUALITY OF REGULATORS

INCREASING PUBLIC PARTICIPATION

OVERLAPPING AND DUPLICATIVE PROGRAMS

USE AND MISUSE OF BENEFIT/COST ANALYSIS

REGULATORY REFORM ALTERNATIVES



FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 11

CONGRESS AND THE REGULATORY AGENCIES

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CHAPTER 11

CONGRESS AND THE REGULATORY AGENCIES *

I. Introduction

Some commentators have characterized independent regulatory agencies as agents of the Congress.¹ While there is clearly a special relationship between such agencies and the Congress, our analysis indicates it is more subtle and complex than one described by traditional concepts of agency.

The agency theory was originally conceived as a device to avoid the strict application of the separation of powers doctrine. This doctrine animates the Constitution's division of legislative, executive and judicial power into separate branches of government. It was felt by the authors of the Constitution that no single branch of government should be able to create law, administer the law, and judge violations of the law. Such a mixture of function was regarded as an invitation to abuse of power.²

Review of the operation of modern regulatory agencies indicates that such agencies are defined by just such a mixture of powers. For example, the Interstate Commerce Commission and the Federal Trade Commission, the first two independent Federal regulatory agencies, make law through rulemaking, judge violations of law (subject to judicial review) through adjudication, and engage in various executive functions related to administration of their mandates.

Initially courts sought to harmonize the separation of powers doctrine with such agencies' unique blend of authorities. The device employed for this task was agency theory. Since presidential control over these agencies, particularly the power to fire agency heads, was severely limited, independent regulatory agencies could not be characterized as agents of the executive.³ Because policy judgments were to be made by such agencies, their activities were not regarded as strictly judicial in character. Ultimately, independent regulatory agencies were conceived of as agents of the Congress.⁴

The early literature on independent regulatory agencies reflects this perceived requirement of the Constitution. Joseph B. Eastman, a distinguished member of the Interstate Commerce Commission in the early part of this century, argued that regulatory agencies are created

*The Subcommittee wishes to express its appreciation for the contribution to this chapter of Stuart Glass, Legislative Attorney, Congressional Research Service, Library of Congress.

¹ MacIntyre, "The Status of Regulatory Independence," 29 *Fed. B. J.* 1 (1968).

² *The Federalist Papers*, Numbers 47 and 48 (Madison) The New American Library, New York, pp. 300-317.

³ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

⁴ See generally Davis, *Administrative Law*, West, St. Paul, Minn., section 1.09. *Prentiss v. Atlantic Coast Line Co.*, 210 U.S. 210, 226 (1908). *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933). *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 331, 398 (1940).

"when the legislative body finds that particular conditions call for continual and very frequent acts of legislation, based on a uniform and consistent policy . . ." ⁵ But the "agent of Congress" theory could not be reconciled with the judicial and executive functions vested in independent regulatory agencies. This tension was at first minimized by characterizing non-legislative powers as ancillary to effectuation of the legislative role of the agencies. ⁶

But this theory could not support the reality of agencies which vigorously employed all of the powers at their disposal. A middle position developed, which, while it did not eschew separation of powers completely, characterized the powers of such agencies as distinct from those to which the Constitution addressed itself. Thus case law defined agency powers as quasi-legislative, quasi-judicial or quasi-executive in character. ⁷

The artificiality of this formulation was too obvious to last. Distinguished legal scholars viewed the effort of allocating agencies to a single branch of government as "completely futile." ⁸ Courts regarded the "quasi-powers" approach with cynicism. As Mr. Justice Jackson stated in the case of *Federal Trade Commission v. Ruberoid Co.* ⁹:

Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution.

Ultimately, the law recognized that the agencies were far too useful to be entirely constrained by the separation of powers doctrine. ¹⁰ Protection against abuse found its source in legislative oversight and judicial review; not separation of function. While judges may still cast their opinions in terms of quasi-legislative versus quasi-executive authorities, Professor Kenneth Culp Davis states the general perception of legal scholars:

In our theoretical discussion, we should frankly recognize that we have abandoned the basic idea that executive, legislative and judicial power should be separated from each other in order to protect against tyranny. We purposefully combine the three kinds of powers in particular agencies. The protection comes, not from separating the powers, but from our system of legislative supervision of administration and from our system of judicial review of administrative action. ¹¹

Demise of the agency doctrine did not decrease the special relationship between regulatory agencies and the Congress, but as indicated by Davis it has emphasized this special relationship. That relationship is largely generated by the Constitutional power of the Congress to limit presidential intervention into the processes of independent regulatory agencies. These powers and the special relationship they define are the subject of this chapter. ¹²

⁵ Eastman, "The Place of the Independent Commission," *Constitutional Rev.*, April 1928, at 95-102.

⁶ *Humphrey's Executor*, *supra* note 3 at 628.

⁷ *Id.* at 629.

⁸ Cushman, R. E., *Independent Regulatory Commissions*, Oxford University Press, New York (1941), p. 446.

⁹ *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 487-488.

¹⁰ Davis, *supra* note 4, at section 1.09.

¹¹ Davis, *Administrative Law Text*, West, St. Paul, Minn. (1972), p. 25.

¹² This chapter confines itself to the respective powers of the executive and legislative branches of government. Judicial control of the actions of Federal agencies is predicated generally upon the Administrative Procedure Act, 5 U.S.C., section 551 *et seq.*, 701 *et seq.*, and the Constitution. Judicial review may be substantially circumscribed by statute, *see*, Davis, *supra* note 4, chapter 28.

II. Control of Personnel

The powers of Congress to control the quality of persons who serve in policy-making positions is an important part of the special relationship between Congress and the agencies. Because of the necessary discretion contained in most regulatory mandates,¹³ control of personnel is particularly important in defining the quality of agency actions. Control of personnel can be divided into two categories, control of the type of person who is appointed to an agency and the criteria to be used to remove such a person from office.

A. CHOICE OF REGULATORS

The Constitution distinguishes between the creation of an office and the appointment of a person to an office.¹⁴ Offices are created by law and are therefore controlled by the Congress. The power to appoint is regulated by Article II, Section 2, clause 2 of the Constitution which provides that the President:

shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Under this clause of the Constitution, appointments of "Officers of the United States" may be made by the President by and with the advice and consent of the Senate and appointments of inferior officers may be made pursuant to law by (i) the President alone, (ii) the courts or (iii) heads of departments.¹⁵ It is clear from the text of the Constitution and judicial construction that the Congress cannot itself appoint any category of officer enumerated in the Appointments Clause.¹⁶ This was recently reaffirmed by the Supreme Court in *Buckley v. Valeo*.¹⁷

The case involved constitutional challenges to several key provisions of the Federal Election Campaign Act of 1971, as amended,¹⁸ including those establishing the Federal Elections Commission. Under the Act, the Commission was composed of eight members. Two, the Secretary of the Senate and the Clerk of the House of Representatives, were ex officio members without voting powers. Two members were appointed by the President pro tempore of the Senate, two by the Speaker of the House, and two by the President. Each of the six voting members was to be confirmed by a majority of both the House of Representatives and the Senate. The Commission's powers fell into three broad categories: (1) the informing function, including inves-

¹³ *FTC v. Ruberoid Co.*, *supra* note 9 at 484.

¹⁴ *Constitution of the United States Annotated*, prepared by the Congressional Research Service, Library of Congress. Lester S. Jayson (supervising editor), Jonny H. Killian (editor), Sylvia Becky (associate editor), and Thomas Durban (associate editor), S. Doc. 92-82, 92d Cong., 2d sess. 513 *et seq.* (1973).

¹⁵ *United States v. Germaine*, 99 U.S. 508, 509 (1879).

¹⁶ *Supra* note 14.

¹⁷ 424 U.S. 1 (1976).

¹⁸ Public Law 91-225.

tigations, and the receipt and dissemination of information, (2) administrative functions under the Act, through rulemaking, issuing advisory opinions, and determining eligibility for federal funds, and (3) functions necessary to insure compliance with the Act and rules promulgated thereunder, by means of informal procedures, administrative hearings and determinations, and civil suits.

The Court struck down the conferral of all but the investigatory and informing responsibilities of the Commission. It held that the process by which the six voting members were appointed and confirmed violated the principle of separation of powers embodied in the Constitution, in that it did not comport with the provisions of the Appointments Clause. The Court regarded all the functions of the Commission except investigating and informing as "significant authority pursuant to the laws of the United States," and stated that an appointee exercising such authority must be appointed in the manner prescribed by the Appointments Clause.¹⁹ Thus, the Court in effect issued a double-edged holding: a body whose members are appointed by Congress may not perform any so-called "executive" functions, and an officer who performs such functions must be appointed in accordance with the Appointments Clause.

While the Congress may not actually appoint an officer to a non-legislative office, the Senate may veto presidential nominations through the advice and consent power and the Congress may define qualifications of nominees through its power to create offices. The advice and consent power is well understood. According to Hamilton it would:

be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice from family connection, from personal attachment, or from a view to popularity.²⁰

The goals of the authors of the Constitution as articulated by Hamilton have largely been achieved. Use of this power by the Senate provides the legislative branch with some measure of control over the manner of persons who control regulatory agencies. But as chapter 17 suggests, stricter criteria and scrutiny of presidential nominees would improve the quality of regulators.

Less well understood is the power over appointees which flows to the Congress through its power to create offices. The Congress has required that appointees be representative of a political party, of an industry, of a geographic region, or of a particular branch of government.²¹ It has also required the President to choose appointees from a list created by others.²² The strictures on the appointment power contained in the Civil Service laws are likewise permissible under the Constitution.²³

The Congress has not attempted to impose testing or other Civil Service-type limitations on presidential appointees to independent regulatory agencies. But it would appear that rational, reasonably objective requirements could be imposed by the Congress without

¹⁹ Buckley, *supra* note 17, slip opinion at 133-135.

²⁰ *The Federalist Papers*, *supra* note 2, Number 76 (Hamilton), p. 457.

²¹ Justice Brandeis dissenting in *Meyer v. United States*, 272 U.S. 52, 264-274 (1926). Zaitzky, H. and Elkle, R., Statutory Positions Requiring Appointment by the President Showing Term, Compensation and Any Other Special Provisions, American Law Division, Library of Congress, January 1976, 86 pp.

²² *Id.*

²³ *United States v. Germaine*, 99 U.S. 508 (1879). *United States v. Perkins*, 116 U.S. 493 (1886).

infringing on the appointments power. Such requirements could substantially add to the control Congress already has over the choice of personnel through the Senate's use of its power to advise and consent.

In summary, there is a sharing of power over the choice of personnel between the President and Congress. While the President or another person enumerated in the Appointments clause must appoint, that discretion may be limited by law. Practically, there is substantial congressional control over personnel selection through the use of the advice and consent power and the power to define qualifications for office.

B. REMOVAL POWER

Congress possesses substantial discretion with respect to removal of members of regulatory agencies. Although the President may remove certain executive branch officers at will, including heads of executive departments, Congress may impose restrictions on the power of the President to remove officers of independent regulatory agencies. In addition, it has been held that the nature of an independent regulatory agency imposes restrictions upon the power of the President to remove its officers whether or not Congress enacts them. This power is essential to the preservation of the independence of the regulatory agencies. For as Justice Sutherland noted:

it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude against the latter's will.²⁴

These principles have been established by three major Supreme Court cases: *Myers v. United States*, 272 U.S. 52 (1926); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); and *Wiener v. United States*, 357 U.S. 349 (1958).

In *Myers*, the Court held that the President is empowered by the Constitution to remove any executive officer appointed by him by and with the advice and consent of the Senate. This power is not subject in its exercise to the assent of the Senate; nor can it be made so by an act of Congress. Congress had provided that Postmasters were to be both appointed and removed by the President by and with the advice and consent of the Senate. The President had removed a Postmaster without consulting the Senate. The Court stated that:

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the system of subordinates. * * * As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. * * *

* * * Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed.²⁵

This holding was later characterized in *Buckley* as stating that
 “* * * Congress could not by statute divest the President of the power

²⁴ *Humphrey's Executor v. United States*, *supra* note 3 at 629.

²⁵ *Myers v. United States*, 272 U.S. 52, 117, 163-4 (1926).

to remove an officer in the Executive Branch whom he was initially authorized to appoint."²⁶

The *Myers* case was ultimately considered too far-reaching and absolutist to remain the law. It was substantially tempered in the *Humphrey's Executor* case, which held that Congress could circumscribe the President's power to remove members of independent regulatory agencies. The Court regarded the facts in *Myers* and *Humphrey's Executor* to be distinguishable. The *Myers* case dealt with the removal of a postmaster; ". . . an executive officer restricted to the performance of executive functions. . . ."

* * * He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside *dicta*, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes for enough to include all purely executive officers. It goes no farther;—much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.²⁷

In contrast, the *Humphrey's Executor* decision dealt with a Commissioner in the Federal Trade Commission, appointed by the President with the advice and consent of the Senate, for a fixed term, and, by statute, removable by the President only for ". . . inefficiency, neglect of duty, or malfeasance in office. . . ." The Court upheld the statutory limitation on the power of the President to remove the Commissioners, on the grounds that the Federal Trade Commission was an agency intended to be independent of executive authority "except in its selection."²⁸ The court in *Humphrey's Executor* stated,

. . . The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.²⁹

The synthesis of those two cases troubled legal scholars. One inquired, "What is the status of the removal power in respect to a commission which not only 'acts quasi-legislatively and quasi-judicially' but also has important executive powers?":

The problem in the *Humphrey* case was simplified because the Federal Trade Commission has not substantial executive duties which are not an integral part of its quasi-judicial work. The Interstate Commerce Commission, however, carries on the executive task of enforcing the Safety Appliance Acts, a task certainly not "incidental" to the quasi-judicial job of ratemaking. The commission is obviously not purely executive in the sense in which the *Humphrey* opinion uses the term; neither is it purely quasi-legislative and quasi-judicial. This is true of most of the regulatory commissions and this means that their constitutional status was not determined by the *Humphrey* case.³⁰

Whatever questions scholars may have had in 1941, the Court had few in *Wiener v. United States*, 357 U.S. 349 (1958). In that decision, the Court again characterized the *Humphrey's Executor* case as hav-

²⁶ Buckley, *supra* note 17, slip opinion at 129.

²⁷ *Humphrey's Executor*, *supra* note 3, at 627-628.

²⁸ *Id.* at 625.

²⁹ *Id.* at 628.

³⁰ Cushman, *supra* note 8 at 446.

ing "... narrowly confined the scope of the *Myers* decision to include only 'all purely executive officers'."³¹ *Wiener* concerned a member of the War Claims Commission, which, like the Federal Trade Commission in *Humphrey's Executor*, performed an almost exclusively quasi-judicial function—namely, determining eligibility for funds. Thus, the law remains as it was stated in *Humphrey's Executor*: the President has substantially less power to remove officers of independent regulatory agencies than to remove officers of purely executive departments.

The remarkable fact involved in *Wiener*, however, was that the limitations on the President's power to remove members of the War Claims Commission were not statutorily enacted. The Commission itself was limited by Congress to a specific duration, but nothing was said in the Act about removal of Commission members. Regardless, the Court held that the limitations on the power of the President to remove members of the War Claims Commission were the same as for members of the Federal Trade Commission. The reason—both Commissions were created by Congress "... to exercise its judgment without the leave of the government."³²

According to *Wiener*, the duties of the Commission determine the dimensions of the Presidential power to remove its officers.

III. The Budget Process³³

Control over the activities of independent regulatory agencies is also exercised through control over the budgets of such agencies. Congress and the President have been vying for such control for decades, with Congress now seemingly in the ascendancy.

An act frequently cited as giving the executive branch the ability to adversely affect the independence of regulatory agencies is the Budget and Accounting Act of 1921.³⁴ By that Act, all federal "departments and establishments," meaning "... any executive department, independent commission, board, bureau, office, agency, or other establishment of Government, including any independent regulatory commission or board. . . ." must submit requests for appropriations to the Office of Management and Budget (OMB).³⁵ The practice has developed by which regulatory agencies are required to submit their legislative proposals, or requested comments of proposed legislation, to the Congress through the OMB.³⁷

It has been argued that such a procedure better enables the President to implement his constitutional mandate to "... take care that the laws be faithfully executed,"³⁸ This is because the increasingly complex nature of government regulation, with conflicting and duplicating jurisdictions, necessitates more coordination between and among the independent regulatory agencies and the enforcement of

³¹ *Wiener v. United States*, 357 U.S. 349, 352 (1958).

³² *Wiener*, *supra* note 31 at 353.

³³ This section does not treat in detail the Congressional appropriations process. For a discussion of that process, see Chapter 16, Section IIA(a), *infra*.

³⁴ 31 U.S.C., section 1 *et seq.*

³⁵ 31 U.S.C., section 2.

³⁶ 31 U.S.C. sections 16, 23.

³⁷ See, Bureau of the Budget Circular No. 344 (Nov. 15, 1937).

³⁸ Art. II, section 8.

laws entrusted to the President. The practice has been criticized by former Federal Trade Commission member A. Everette MacIntyre:

In practice, the Act resulted in a degree of control over substantive programs of the agency which were certainly not envisioned by the Congress when it passed what it considered to be a statute dealing with administrative detail. . . . An agency's proposed appropriations request is reviewed by the Bureau of the Budget, which follows policies and priorities established by the President and not necessarily by Congress. To the extent they coincide congressional intent will be fulfilled; to the extent they differ congressional intent will, of necessity, take a back seat.³⁹

Other chapters of this report support the concerns expressed by Mr. MacIntyre.

There are, however, certain congressional enactments which grant a degree of exemption from OMB review. Seven such acts have been found, covering 11 different agencies. These are of three types: First those which require that the budget recommendations submitted by the covered agencies be transmitted by the executive to Congress without revision;⁴⁰ second those which require that an agency submit its budget estimates and requirements and legislative recommendations, testimony, or comments to OMB, and the Congress (or designated committees) concurrently;⁴¹ and third those which require concurrent submission of legislative recommendations, testimony or comments alone.⁴²

Congress took concerted action to regain substantial control over the budget process by enacting the Budget and Impoundment Control Act of 1974.⁴³ The express purposes of the Act were:

- (1) to assure effective congressional control over the budgetary process;
- (2) to provide for the congressional determination each year of the appropriate level of Federal revenues and expenditures;
- (3) to provide a system of impoundment control;
- (4) to establish national budget priorities; and
- (5) to provide for the furnishing of information by the executive branch in a manner that will assist the Congress in discharging its duties. 31 U.S.C. § 3101.

The Act establishes budget committees in both the House of Representatives and the Senate, and a Congressional Budget Office. The Congressional Budget Office is empowered to secure information from the executive branch and each of the agencies, and to provide assistance to the Congress in the compilation of a comprehensive annual budget.⁴⁴ The Budget Committees report such budget figures to their respective Houses, which then enact a concurrent resolution on the budget.⁴⁵ Congress exercises control over the budget process by requiring in the Act that the first concurrent resolution on the budget for a fiscal year be adopted before legislation providing new budget au-

³⁹ MacIntyre, *supra* note 1, at 6.

⁴⁰ U.S. Postal Service, Public Law 93-328, section 3. U.S. International Trade Commission, Public Law 93-618, section 175(a) 1.

⁴¹ Consumer Product Safety Commission, 15 U.S.C., section 2076(k)(1)(2). Commodity Futures Trading Commission, Public Law 93-463, section 101. Privacy Protection Study Commission, Public Law 93-579, section 5(a)(5). National Transportation Safety Board, Public Law 93-633, section 304(b)(7).

⁴² Securities and Exchange Commission, Board of Governors of the Federal Reserve System, Federal Report Deposit Insurance Corporation, Federal Home Loan Bank Board, and National Credit Union Administration, Public Law 93-495, section 111.

⁴³ Public Law 93-344.

⁴⁴ 5 U.S.C. section 5332.

⁴⁵ 31 U.S.C. section 1322.

thority, new spending authority, or change in revenues or public debt limit is considered.⁴⁶

The significant aspects of the Act are (1) the creation of the mechanism, the Congressional Budget Office, for giving Congress the capability to compile information necessary for formulating the congressional budget, avoiding dependence on the executive budget, and (2) the statutory requirement that Congress relate its actions to its own budget, rather than the President's budget.

The Act also includes controls over the presidential impoundment of funds, whereby the President could freeze budget authority for a particular agency and effectively superimpose his own spending priorities over those of the Congress. The President may now defer budget authority for a period not exceeding the end of the fiscal year in which he elects to so defer; but he must first send a deferral message to Congress. The deferral becomes effective if, after 45 legislative days, neither House of Congress has enacted an impoundment resolution disapproving the deferral. Also, the President may, under certain circumstances, rescind entirely any budget authority not required to carry out the full objectives of the programs for which it is provided, or to effect savings, or provide for changes in requirements. To rescind, the President must first send a rescission message to Congress. The rescission becomes effective only if, within 45 legislative days after receipt of the message, both Houses of Congress enact a rescission bill approving the rescission.⁴⁷

Both the budget provisions and the impoundment provisions of the Act should have the effect of granting Congress greater control over the funding of independent regulatory agencies.

IV. Authority to Control the Conduct of Litigation

Congressional power to control the conduct of litigation is a vital part of the relationship between Congress and regulatory agencies. Decisions as to whether to prosecute under a relevant statute, whether to defend against a suit brought for judicial review of an agency action or decision or not to settle, whether to appeal an adverse court ruling, on what theories to bring suit, what strategies to use, all affect the ability of an agency to enforce the statutes under its care or to forward an agency's interpretation of federal laws and constitutional provisions.

At the moment, the conduct of litigation rests in large part in the hands of the Attorney General, an executive officer appointed by the President and who serves at his pleasure.

The Attorney General is given broad statutory authority to represent the United States, its agencies and officers. He is authorized with certain exceptions to conduct litigation in which the United States, an agency, or officer is a party or is interested, by 28 U.S.C. Sec. 516:

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

⁴⁶ 31 U.S.C. section 1324, *et seq.*

⁴⁷ 31 U.S.C. sections 1401-7.

In addition, he has wide authority to supervise the conduct of litigation through United States Attorneys and Assistant United States Attorneys, pursuant to 28 U.S.C. Sec. 519:

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

Where an action, suit, or proceeding in a court of the United States does not include as a party an agency, officer, or employee of the United States, or the United States, the Attorney General may intervene as a party if the suit involves the constitutionality of any Act of Congress "affecting the public interest."⁴⁸

Congress has the power to modify the authority of the Attorney General or create exceptions to the general rule requiring the Attorney General to conduct or supervise the litigation of federal agencies. However, the experience of the Federal Trade Commission points out the difficulty of drafting legislation which the courts will recognize as creating authority in a regulatory agency to conduct its own litigation and represent itself.

For example, section 9 of the Federal Trade Commission Act states that the Commission "... may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of witnesses." However, in *Federal Trade Comm. v. Guignon*,⁴⁹ it was held that the Commission does not have the authority to institute court proceedings for the purpose of enforcing its own subpoenas. By contrast, in 1966, the Supreme Court had upheld the right of the Commission to appear on its own behalf before courts of the United States to seek enforcement orders. *Federal Trade Comm. v. Dean Foods Co.*⁵⁰

An attempt was made to clarify the situation with regard to the authority of the Commission by means of a rider to the Trans-Alaska Pipeline Authorization Act⁵¹ which provided new statutory authority for the Commission to conduct its own litigation:

"Whenever in any civil proceeding involving this Act the Commission is authorized or required to appear in a court of the United States, or to be represented therein by the Attorney General of the United States, the Commission may elect to appear in its own name by any of its attorneys designated by it for such purpose, after formally notifying and consulting with and giving the Attorney General 10 days to take the action proposed by the Commission."

A further modification of the authority of the Commission to conduct litigation was added by the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act.⁵²

While no other independent regulatory agency has as broad statutory authority as the Federal Trade Commission to represent itself in court, enforce its own orders, or conduct its own litigation, there are wide variations in like statutory authorities for other agencies. The Federal Communications Commission and the Federal Maritime Commission, for example, are without any independent statutory authority

⁴⁸ 28 U.S.C. section 2403.

⁴⁹ 390 F. 2d 323 (8th Cir. 1968).

⁵⁰ 384 U.S. 597 (1966).

⁵¹ Public Law 93-153, Sec. 408 (1973).

⁵² Public Law 93-637, Sec. 204 (1974).

to conduct litigation. The Consumer Product Safety Commission may represent itself in civil actions if the Attorney General refuses the case or fails to act in a timely manner and may, with the concurrence of the Attorney General, initiate, prosecute, and appeal criminal sanctions.⁵³ The Civil Aeronautics Board may have the right to participate in certain proceedings upon request of the Attorney General⁵⁴ and the Board may invoke the aid of any court to require attendance, testimony, and production of witnesses.⁵⁵ The Interstate Commerce Commission⁵⁶ and the Securities Exchange Commission⁵⁷ have broader grants of authority, created by increments in individual parts of their enabling acts.

V. Oversight

An informed electorate is essential to a government that is truly "of the people." Likewise, the people's representatives are in need of information to perform their constitutionally mandated duties. Without adequate information Congress would be severely restricted in wisely legislating. Equally as significant, Congress has a duty to the people it serves to inquire as to whether the laws are being enforced and are effective before it considers amending those laws or enacting new laws. Bringing information to the attention of Congress in the exercise of powers under Article I of the United States Constitution, has often proved to be effective in resolving problems by prompting citizens or public officials to cure deficiencies that would otherwise require legislation.

The investigatory powers of legislative bodies date back in Anglo-American history at least to 1621. In 1742, William Pitt, a Member of the British Parliament who later became Prime Minister said:

We are called the Grand Inquest of the Nation, and as such it is our Duty to inquire into every Step of public Management, either Abroad or at Home, in order to see that nothing has been done amiss.⁵⁸

The congressional power to ascertain whether laws are being "faithfully executed" has been upheld by the United States Supreme Court in a long line of cases. In the landmark case of *Watkins v. United States*,⁵⁹ the Court said:

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruptions, inefficiency or waste.

To oversee the administration of Federal laws and to investigate matters which may need legislation, Congress clearly has the power to use compulsory process, i.e., to issue subpoenas for documents, compel

⁵³ Consumer Product Safety Commission Improvements Act of 1976, Public Law 94-284, Sec. 11(a), 15 U.S.C., section 2060(a).

⁵⁴ 49 U.S.C., section 1488.

⁵⁵ 49 U.S.C., section 1484(c).

⁵⁶ 49 U.S.C. sections 5(8), 12(3), 16(12), 322(b)(1), 322(2).

⁵⁷ 15 U.S.C. sections 77t, 78u(c), 78(c) and (f), 79k(d), 79r(f) and (g), 80a-35, 80a-41(c), 80a-41(e), 80b-9(c) and 80b-9(e).

⁵⁸ Chandler, R., *History and Proceedings of Parliament from 1621 to the Present*, London (1743). Vol. 13, p. 157.

⁵⁹ 354 U.S. 178, 187 (1957).

testimony—except when it would be self-incriminating—and have such testimony taken pursuant to laws providing for prosecution of perjury. The rationale for compulsory process is summarized by the Supreme Court in *McGrain v. Daugherty*,⁶⁰

Experience has taught that mere requests for information often are unavailing, and also that information which is so volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.

Ancillary to its oversight and investigatory duties, the Supreme Court has long recognized congressional contempt powers because:

Here, we are concerned, not with extension of congressional privilege, but with vindication of established and essential privilege of requiring the production of evidence. For this purpose, the power to punish for contempt is an appropriate means.⁶¹

A contempt proceeding can take one of two routes. When the contemptuous act of an individual is reported to the House, the House Resolution can direct the Speaker to certify the contempt and forward it to the local U.S. Attorney for prosecution pursuant to 2 U.S.C. 192 which provides for a maximum penalty of 1 year in jail and a \$1,000 fine. Or alternatively, the House Resolution can direct the Speaker to order the Sergeant at Arms to summon the offender to the House chambers to show cause why he should not be held in contempt and held in confinement. This second contempt method is used to force testimony or the production of subpoenaed documents. It rests on the common law theory that a contemptuous offender holds the key to his jail cell; produce the subpoenaed documents and the offender will be released.

The Subcommittee has learned by experience that there are a variety of techniques used to thwart the exercise of Congressional oversight powers. A summary of those experiences is important to the understanding of the techniques employed to block the Congress and the important information which the executive branch of government and private companies seek to keep from the people's representatives.

DEPARTMENT OF COMMERCE

With regard to its investigation into the impact of the Arab trade boycott on American business,⁶² the Subcommittee subpoenaed reports of foreign-imposed boycott requests received by American exporters—reports filed with the Department of Commerce pursuant to the Export Administration Act. Commerce Secretary Rogers C. B. Morton refused to comply with the Subcommittee's subpoena arguing that Section 7(c), a confidentiality provision of the Export Administration Act, applied to Congress implicitly.

Chairman Moss pointed out to Secretary Morton that Congress cannot preclude itself from access to documents without doing so expressly in a statute. It cannot be done by silence or implication. The Subcommittee carefully and extensively examined Mr. Morton's defense and on November 11, 1975, approved by a vote of 10 to 5, a resolution finding him in contempt of Congress. One day before the resolu-

⁶⁰ 273 U.S. 135, 175 (1927).

⁶¹ *Jurney v. McCracken*, 249 U.S. 149, 150 (1935).

⁶² See *The Arab Boycott and American Business, Report by the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce*, 94th Cong., 2d Sess., September 1976.

tion was scheduled to be brought before the Committee on Interstate and Foreign Commerce, Secretary Morton agreed to provide the subpoenaed reports.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Pursuant to the Subcommittee's investigation into how the Department of Health, Education, and Welfare insures the quality of health care provided with \$10 billion in Federal Medicaid and Medicare funds to accredited hospitals, the Subcommittee subpoenaed hospital accreditation records from the Joint Commission on Hospital Accreditation, records which were in the custody of HEW. The JCAH reports are used by HEW to determine whether hospitals receiving Federal funds are meeting Federal standards. Secretary F. David Mathews initially refused to comply with the subpoena citing a parenthetical phrase in 42 U.S.C. 1395bb which states that the Secretary would receive documents "(on a confidential basis)." In an exchange of letters, the Subcommittee Chairman noted that the statute cited by Mr. Mathews, like that cited by Rogers Morton, does not mention Congress and that Congress cannot preclude itself from gaining information needed to perform its oversight duties absent express statutory language to that effect.

On the morning of November 12, 1975, two hours before the Subcommittee was to consider whether to find Secretary Mathews in contempt of Congress, the Secretary complied with the subpoena and turned over the requested reports to the Subcommittee.

ASHLAND OIL COMPANY

In accordance with its investigation of natural gas reserves, the Subcommittee sought reserve reports submitted to the Federal Trade Commission by forty-four oil companies in response to an FTC energy study conducted pursuant to Section 6(b) of the Act. Ashland Oil Company was the only firm to object to the FTC turning the reports over to the Subcommittee. Ashland claimed Section 6(f) of the Act prevents disclosure by the Commission of "trade secrets" even to Congress for purposes of performing its oversight and legislative functions, even though Congress has not expressly precluded itself in the Act. Ashland failed to obtain a permanent injunction from a local U.S. District Court Judge.⁶³ But a stay pending appeal prohibited the Subcommittee from gaining access to the document.

The House approved a resolution in January 1976, granting Chairman Moss the right to intervene before the U.S. Court of Appeals in the FTC suit to affirm the District Court decision. The resolution also provided funds to pay for litigation costs to vindicate the powers of Congress. On September 20, 1976, the Court of Appeals, with one judge dissenting, sustained the District Court decision, holding that the plaintiffs had failed to establish a likelihood of irreparable injury warranting injunction.⁶⁴ The Court ruled:

No substantial showing was made that the materials in the possession of the FTC will necessarily be "made public" if turned over to Congress. Therefore,

⁶³ 407 F. Supp. 297 (1976).

⁶⁴ See U.S. Court of Appeals for the District of Columbia, No. 76-1174.

we need not decide what application, if any, 15 U.S.C. § 46(f) might have if it were evident that Congress intended to "make public" trade secrets. At a minimum, we think it is clear that absent such a showing, 15 U.S.C. § 46(f) does not preclude the FTC from transmitting trade secrets to Congress pursuant either to subpoena or formal request.

THE PRESIDENT OF THE UNITED STATES

On June 22, 1976, the Subcommittee subpoenaed records from American Telephone and Telegraph Company concerning warrantless wiretaps conducted at the direction of the Attorney General on behalf of the President. The Subcommittee needs the records in order to determine whether the privacy of citizens' telephone communication is being safeguarded in accordance with Section 605 of the Federal Communications Act.

On July 28, a U.S. District Court Judge granted a temporary restraining order, later expanded to a permanent injunction, at the request of lawyers for President Ford. The President asserted "Executive Privilege," reasoning that since AT&T personnel install the wiretaps at the request of the President, they are therefore agents of the President.

The House approved a resolution on August 26, 1976, granting Chairman Moss the authority to represent the House in appealing the Judge's decision. The appeal is now pending before the U.S. Court of Appeals.⁶⁵

FEDERAL ENERGY ADMINISTRATION

Delay is often a tool employed to attempt to keep Congress from receiving timely information. During its review of the adequacy and reliability of the Federal Energy Administration's Final Report on Oil and Gas Resources, Reserves, and Productive Capacities,⁶⁶ it became necessary for the Subcommittee to obtain individual operator reports on energy reserves from the FEA. An initial request for this information was made on March 2, 1976. A follow-up letter was sent on March 17.

Only after this second letter had been received did FEA respond on March 22. In this letter, Administrator Zarb asserted that the requested materials would be turned over to the Subcommittee only because Section 11(d) of the Energy Supply and Environmental Coordination Act⁶⁷ explicitly exempted Congress from the non-disclosure policies of the section. Mr. Zarb also noted in his letter that Subcommittee staff had indicated that it probably would not be necessary to release the requested information to the public. The implications of the Administrator's letter that (i) the Congress could not obtain sensitive information absent specific statutory language, and (ii) a pledge of confidentiality could be inferred from staff statements, required a response.

On the same day, Chairman Moss replied by pointing out the inaccuracy of Mr. Zarb's analysis. Two days later on March 25, 1976,

⁶⁵ United States District Court for the District of Columbia Circuit, No. 76-1712.

⁶⁶ Federal Energy Administration, Final Report on Oil and Gas Resources, Reserves, and Productive Capacities (October 1975). The adequacy and reliability of this report were ultimately considered by the Subcommittee in hearings on August 6, 1976.

⁶⁷ Public Law 93-319, section 11(d), 15 U.S.C. section 796.

Mr. Zarb indicated by letter that no conditions would be imposed on the transfer of documents to the Subcommittee. On March 25, the requested documents were turned over to the Subcommittee.

In total, three weeks were required to obtain documents essential to a Congressional inquiry. This history is all too typical of some executive branch responses to Congressional requests for information.

The barriers to oversight described above illustrate the kinds of obstructionism that has all too often deterred Congress from exercising more comprehensive oversight. Notwithstanding these barriers, Congress must give itself the power to seek information on an agency-wide basis. Modifications in the Rules of the House to provide committees and subcommittees the power to take depositions and employ written interrogatories would go far to improve oversight. Information which could be gained through the use of such authorities would include zero-based budget reviews and enforcement activity. Such information would allow the Congress to identify and then focus its limited resources on important regulatory problems. Once such information is made available to the public through hearings, reform will quickly follow.

VI. Conclusion

The relationship of the Congress to the independent regulatory agencies, like regulation itself, is characterized by change. It includes the power of the Congress to limit by law Presidential intervention in the processes of independent regulatory agencies. Through the use of its powers, Congress can: (1) define in detail the duties of independent regulatory agencies, (2) establish selection criteria for officials who will guide them, (3) establish agency budgets and prohibit particular expenditures, (4) define the ability of agencies to seek court redress for citizens, and (5) define or limit any authority to withhold information from Congress or the public.

Taken together these powers create a close relationship between the Congress and the independent regulatory agencies and require that these agencies follow the mandate of law uncolored by the political counsel of the President.

These congressional powers can apply with equal force to Executive branch agencies such as the Food and Drug Administration, the Environmental Protection Agency and the National Highway Traffic Safety Administration which are vested with specific authorities and responsibilities by statute. Other powers regarding these agencies are more limited in scope.

This, then, is the basis of the special relationship between Congress and the independent regulatory agencies. Congress creates law under the Constitution; the agencies must carry out that law. To the extent that Congress, on behalf of the electorate, desires to assert closer control over independent regulatory agencies it can, with minimal limitations, do so. It is the responsibility of the Congress to insure on a continuing basis that the requirements of law are being met and that statutes are amended as necessary to carry out the public interest.

THE UNIVERSITY OF CHICAGO, CHICAGO, ILL., JANUARY 1, 1880.

My dear Sir,

I have just received your letter of the 29th inst. and am glad to hear that you are still interested in the study of the history of the United States. I am sure that your interest will be well rewarded, for the study of our history is one of the most important and interesting of all studies. It is a study which should be pursued by every citizen of our country, for it is only by knowing our history that we can understand our present position and our future prospects. I am sure that you will find the study of our history a most profitable and interesting one.

Very truly yours,

Wm. D. Howells

I have just received your letter of the 29th inst. and am glad to hear that you are still interested in the study of the history of the United States. I am sure that your interest will be well rewarded, for the study of our history is one of the most important and interesting of all studies. It is a study which should be pursued by every citizen of our country, for it is only by knowing our history that we can understand our present position and our future prospects. I am sure that you will find the study of our history a most profitable and interesting one.

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FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 12

QUALITY OF REGULATORS

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CHAPTER 12

QUALITY OF REGULATORS

I. Summary

It is a truism that "poor men will wreak havoc with good laws."¹ The chronic task of selecting qualified regulators has bedevilled governments historically. It has been as enduring as it has been perplexing. In pursuing this issue, the Subcommittee did not expect to find easy answers to questions which have baffled so many others. It was not our purpose to praise or damn those heading the regulatory agencies. Rather we have tried to understand the process of selecting candidates, the nature of their duties, and the effects of their experience in office. With understanding, we may conceive what might be done to assure that the best qualified are willing to accept office, are selected for office, and are encouraged to perform their duties conscientiously for a full term.

Although the Senate voiced its concern with the quality of executive and regulatory appointments in 1960,² we found that the influence of partisanship or narrow economic interest in these appointments has not diminished. In the past few years, it has accelerated. We found that an alarmingly high percentage of top regulatory officials resign not so much to improve their income as to escape from a setting which they found frustrating. We found little significant progress in improving the quality of nominees or the criteria and process of selection of candidates. We found that many secondary posts in regulatory agencies had become subject to political endorsement, with the effect that the agencies' tradition of an independent or non-partisan approach was compromised.

Aside from the scarcity of personalities with the rare qualities required of an ideal regulator, Corwin Edwards noted two handicaps to the nomination process: the President and the Congress have tended to underestimate the importance of the regulatory positions and what is required of those who fill such positions; and the law and custom fail to vest the positions with the status, independence, and immunity to pressure which will appeal to qualified candidates. Whereas Edwards noted that the regulator must combine in one office the performance of investigator, arbiter, analyst, enforcer, and judge, Theodore Lowi asserted that vague legislation itself is the enemy of good regulation. We found indications that candidates who were qualified by experience, attitude, and character might be, for those virtues, either unavailable or unacceptable for appointment to a high regulatory position, whereas others, being acceptable and available

¹ Report on Regulatory Agencies to the President-Elect, Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 86th Cong., 2d sess. (Comm. Print 1960), p. 66.

² *Id.*

for the lack of such experience, attitudes, and character, would be less qualified.

We found that few in top positions in regulatory agencies had a record of being sensitive to or concerned deeply with consumer interests. In recent years, the proportion appointed from the ranks of industries regulated has risen dramatically. Moreover, there has been an unwholesome increase in the number of former regulators now attached to the regulated firms, as employees, consultants, or attorneys. That influence by regulated industries is compounded by favors and *ex parte* communications tolerated by agencies. The failure of Commissioners to serve full terms and apparent conflicts of interest linked to personal holdings also affect public confidence in the regulators.

With the aim of reversing the trend and elevating the quality of regulatory agencies, the Subcommittee recommends:

(a) That those responsible for scrutinizing candidates for regulatory office should invite public comment and thereafter proceed to develop criteria or standards for candidates;

(b) That, in anticipation of vacancies, the public be invited to share in the development of a talent bank of prospective nominees;

(c) That there be no secrecy in the process of selection and that the public be permitted broad participation in the process;

(d) That, to improve the quality of staff by internal action, the regulatory agencies, with the Civil Service Commission, examine their personnel practices for the purpose of introducing or extending opportunities for career regulators to achieve progressively broader experience; e.g. through progressive in-service training or through exchanges among Federal and state regulatory agencies;

(e) That there be no political clearance for any staff position in any independent regulatory agency.

II. Introduction

The swift pace of technologic change and the rapid growth of commerce among the States commencing during the Nineteenth Century obliged the Congress to delegate policy formulation and rulemaking powers to regulatory commissions, rather than attempt to meet each economic shift with a new statute. Beginning with the Interstate Commerce Commission in 1887, Congress conferred on these agencies progressively wider authority. In creating regulatory agencies patterned after the ICC, the intent of Congress was that each would be independent of the executive branch and that each would function in part as an arm of the Congress.³

The Subcommittee deplores the widespread failure to appreciate the depth and range of responsibilities of the regulatory agencies, whose burden has impressed us in our investigations. As Corwin Edwards has said:⁴

³ See A. Everett MacIntyre, "The Status of Regulatory Independence," *Federal Bar Journal*, Vol. 29, Winter 1969, pp. 158-177. *Myers v. United States*, 272 U.S. 52 (1926); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958).

⁴ Joint Hearings on Regulatory Reform—Quality of Regulators before the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, U.S. House of Representatives and the Committees on Commerce and Government Operations, U.S. Senate, 94th Cong., 1st sess., Vol. 1, Serial No. 94-80 (1975), pp. 8-10.

Regulatory authority is inherently harder to exercise than most judicial authority. It includes wider and less channeled discretion to develop and apply concepts of the public interest . . .

(T)his discretion is enhanced by need to establish priorities . . .

The tighter the budget, the more important is the discretionary element . . .

In the case of the Federal Trade Commission, the entire budget probably would not be too large to do a complete job in curbing collusive restraints of trade, or in precautionary control of mergers, or in reduction of deceptive practices, or in relevant economic research . . .

For an additional reason, regulatory authority is usually harder to exercise than judicial authority. The options open to regulators as to kinds of action that they may undertake are more numerous than those open to courts or to prosecutors that appear before courts. A court can decide issues that come before it and that, in their major characteristics, have been formulated elsewhere. If it is a court of initial jurisdiction, the issues have been shaped by the parties to the proceeding. If it is an appellate court, it can affirm, modify, or reverse the decision below, and can remand the matter to the court below for action appropriate to the terms of the remand; but it cannot change basically the formulation of the issues or the nature of the process by which they are to be decided . . .

A regulatory body not only has the options available to both courts and prosecutors, but has additional options available to neither. These options differ for different regulatory bodies . . .

One might truly say that an able and wise Justice of the Supreme Court has demonstrated many, but not necessarily all, of the qualities that are needed for able and wise action as a Federal Trade Commissioner.

More than 15 years ago, James M. Landis reported to President-elect John F. Kennedy that:

As long as the selection of men for key administrative posts is based upon political reward rather than competency little else that is done will really matter. Thus, the real issues are two: (1) are those posts sufficiently attractive to draw good men; and (2) how can these men be found?

. . . The appeal of a job can . . . be destroyed if the President, through design or neglect, permits his prejudices in behalf of political associates or friends to dictate the disposition of individual items of business. No truly good man can submit to such interference.⁵

The exercise of political influence in the selection of candidates is justifiable to the degree that the Commissioner's job, in Edwards' words, is "thought to be in part political and controversial, or controversial and hence political," although the job is viewed also as one "applying well-understood and agreed standards of public policy in complex situations. . . ."⁶ So far, no one has succeeded in drawing a clear distinction between the political and public interest, since shifts in public interest express themselves politically.

A trio of witnesses, Ralph Dungan, Lee White, and Peter Flanigan, representing respectively experience with personnel practices of the White House during Kennedy, Johnson, and Nixon years, concurred in the view that a candidate's political philosophy should not be the primary factor in selection. In Flanigan's words,⁷

These very important posts, in managing what is known as the fourth branch of government, should not be given out as a reward for past political favors or activities.

But White warned,⁸

I don't think anybody is going to expect that politics will stop being played by politicians, and Presidents are politicians.

⁵ *Supra* note 1, at 66-67.

⁶ *Supra* note 4, at 6-7.

⁷ *Id.* at 57.

⁸ *Id.* at 59.

And Dungan added,⁹

[I]n my years . . . , the most untoward, unconscionable, immoral . . . pressures came from this end of the avenue [Congress], not in terms of maintaining high standards but in terms of getting "my friend" appointed.

On the basis of their common practical experience, these witnesses of divergent political views agreed remarkably on the desirability of selecting candidates for their competence rather than for political loyalty. They were equally skeptical about legislation for achieving improvements in the process of selection, although they did endorse proposals that the process of selection be shared with the public.¹⁰

Despite years of experience and study of the appointment process, we found little significant progress has been made in improving the quality of regulators appointed. No single effective way has yet been found to assure the selection of highly competent, independent, and knowledgeable regulators. The White House, in declining the invitation of Chairmen Magnuson, Ribicoff, and Moss to have one of its representatives participate in the November 1975 hearings on the appointment process, stated:

So far as we know, no one has yet developed objective criteria and techniques to assist the President in making his selections or the Senate in performing its advise and consent function.¹¹

This attitude is negative. We believe new procedures and standards can and must be developed to improve the qualifications of regulators and public confidence in their agencies.

Both administrative and legislative remedies are to be considered. In reference to legislative remedies, Dungan stressed the importance of oversight. He said, "I do not believe the most critical aspect of the legislative function in contemporary society is to legislate but, rather, to monitor the activities of the executive."¹² Similarly Lee White observed, "The most important period while I was at the [Federal Power] Commission was preparing for the two oversight hearings we had, and we did more shaping up in understanding what was going on in preparation for those than for anything else."¹³

Accordingly, we expect our investigations no less than our recommendations will induce reforms in this critical field.

A. INDUSTRIES REGULATED BY COMMISSIONS AND AGENCIES

The nine regulatory agencies which are the subject of this report have economic, health, and safety responsibilities for vast domains of interstate and foreign commerce. Three of these (FTC, CPSC, and EPA) compose, issue, and enforce rules and standards that apply broadly or generally throughout the economy. The other six agencies each specialize in a single industry or closely related groups of industries (e.g., vehicle and tire manufacturers regulated by NHTSA). The following table¹⁴ shows the volume of commerce that five of the

⁹ *Id.* at 63.

¹⁰ *Id.* at 66.

¹¹ *Id.* at 4.

¹² *Id.* at 61.

¹³ *Id.*

¹⁴ Statistics furnished by the agency which regulates the industry in response to question three of the Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce questionnaire of June 1975.

six specialized agencies monitor, (FDA could not provide comparable data) :

Agency	Year of data	Number of companies in the regulated industry	Number of employees in the regulated industry (thousands)	Value of assets (billions)	Value of sales (billions)
FCC-----	1973	11,694	1,250	NA	\$96.6
FPC-----	1974	5,059	482	¹³ \$59.5	¹⁴ 59.6
ICC-----	1974	17,076	1,318	39.2	NA
SEC-----	1974	6,159	456	NA	130.4
NHTSA-----	1974	4,033	831	12.4	64.9
Total-----		44,021	4,337	111.1	348.5

¹³ Data included for interstate natural gas producers are for 1972.

¹⁴ Does not include data for hydroelectric companies which FPC could not provide.

In fiscal year 1974, there were 8,035 employees in these five agencies: one employee for every five regulated companies. The total budget for these five agencies in fiscal year 1974 was \$182.1 million, .05% of the value of the yearly sales of the industries these agencies regulate.

B. THE APPOINTMENT PROCESS

The President ¹⁷ with the advice and consent of the Senate appoints the commissioners of the six collegial commissions (the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission) for terms of 5 to 7 years. The President also appoints the Administrators of the Environmental Protection Agency and the National Highway Traffic Safety Administration with the advice and consent of the Senate. In effect, the President also appoints the Commissioner of the Food and Drug Administration through consultation with the HEW Secretary, who designates the candidate selected for this Schedule C, Level V post.¹⁸

C. DEVELOPMENT OF THE WHITE HOUSE PERSONNEL OFFICE

The first formal personnel operation in the White House installed during the Truman Administration was headed by Donald Dawson, an Assistant to the President. Dean E. Mann describes the work of the office as principally that of a "clearinghouse, receiving the names of candidates from all sources but doing little in the way of active recruiting or evaluation."¹⁹

Sherman Adams was the principal actor in the personnel field during most of the Eisenhower Administration. He had assistance from a small staff which performed some recruiting and clearance functions.²⁰

¹⁷ During the first year of the next Presidential term, nine vacancies will occur on these six commissions. The President will appoint or reappoint the Chairman for each of five commissions as well as the Administrators of EPA and NHTSA and the Commissioner of FDA. CPSC Chairmen serve for a term certain (15 U.S.C. 2053(a)).

¹⁸ This Schedule C appointment is an exception to the rule that such positions are Grade GS-15 or below. It is paid under the executive level pay system at a salary of \$37,800.

¹⁹ Mann, Dean E. and Jameson W. Doig. *The Assistant Secretaries: Problems and Processes of Appointment*, Washington: Brookings Institution, 1965, p. 269.

²⁰ Executive Appointments in Independent Regulatory Commissions, Congressional Research Service, October 9, 1975, p. 18.

During the Kennedy Administration, a Special Assistant to the President was placed in charge of a limited continuing recruitment effort. The objective was to establish a "talent pool" of individuals who were both qualified and politically acceptable for high positions.²¹

The appointment in 1965 of John Macy to a dual status as Chairman of the Civil Service Commission and Special Assistant to President Johnson signaled the advent of a systematic effort to maintain a talent pool. Macy was to provide a continuing list of qualified individuals who could fill positions as they became vacant.²²

The head of the White House Personnel Office (WHPO) for the first 2 years of the Nixon Administration was Harry Fleming, succeeded in September 1970 by Frederick Malek. As soon as H. R. Haldeman, the President's Chief Assistant, took a direct interest in the Malek shop, the agencies perceived a definite change of pace and attitude. Malek, with the President's blessing, undertook to review and clear all political appointments.²³

According to Robert Davison, former White House executive, it was not Malek but Alan May who composed a guidebook which instructed personnel officers in all Departments to consider every candidate's political qualifications.²⁴ Davison did not think that May's manual was issued at the direction of either Malek or the other possible supervisor, Jerry Jones. In that event, one can only conjecture that May's authority to issue the manual, despite strong objections from others on the staff, was conferred by the top echelon in the White House.

Davison testified also that the White House ordered what were in effect quotas to each Department for placing selected employees who had served on the Committee to Re-elect the President in 1972. One curious effect of this order was to replace Republicans, appointed in 1968, who had served well and faithfully but who had not been active in the 1972 campaign. Even Republicans who had been cooperative received preference less than that accorded to Democrats sympathetic to Nixon policies. Dissenting Republicans, such as former Secretary of the Interior Hickel, received even a lower rating. The test was less party affiliation than what was called orientation. For the most part, appointments were aimed at vacancies listed periodically in the so-called Plum Book. In at least one agency (HUD), political profiles had been prepared by an overzealous personnel officer, March Miller, on all civil service career employees in that department.

Given the credibility of the Davison testimony, which we have no reason to doubt, the Subcommittee must express its alarm and outrage that appointments to senior or lower echelon positions in the civil service have been based on a candidate's full acceptance of the purely personal, political attitude of a President. Such intolerance of dissent, whether interparty or intraparty, especially when linked to one personality, destroys whatever hope a people may have of profiting from its errors. It signals the gestation of dictatorship, of government by power and force, rather than by the prevalence of public needs and opinion expressed in open debate.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 19.

²⁴ Hearings on Violations and Abuses of Merit Principles in Federal Employment before the Subcommittee on Manpower and Civil Service of the House Committee on Post Office and Civil Service, 94th Cong., 1st sess., Pt. II, Serial No. 94-20 (1975), p. 195 *et seq.*

D. CURRENT WHITE HOUSE PERSONNEL OFFICE

The Ford Administration's WHIPO employs about 25 aides under Director Douglas Bennett. It is one of three units in the White House Operations Office headed by an Assistant to the President. The WHIPO maintains three personnel data banks, including the names of approximately 10,000 people. The Executive Branch Presidential Appointee data bank contains approximately 3,500 names; the Incumbent File approximately 3,000; and the Talent Bank approximately 3,500.²⁵

All full and part-time PA (Presidential Appointees without Senate confirmation) and all PAS (Presidential Appointees with Senate confirmation) are filed in the Presidential Appointees data bank.

The Incumbent File holds names and records of incumbents in Schedule C positions throughout the Federal Government. The resumes and SF-171 forms of these individuals come to the WHIPO when they are appointed.

The Talent Bank is a compilation of the names of well-qualified persons who may be interested in non-career government positions. Resumes are submitted by the individual or by a sponsor. Staff aides in WHIPO decide whether a nominee's name should be filed in the Talent Bank.

Data in the Presidential Appointees file include title, grade level, type of appointment, tenure, name, registration, legal state of residence, date of appointment, date term expires, employment background, *sex* and *ethnic background*, political affiliation, education background, work experience, performance rating, salary range, *political experience*, overall rating, availability, and sponsors and endorsers. Similar information is filed in the Talent Bank and the Incumbent File. The files also give the date of application and the departments or agencies to which a resume has been referred.

III. *Analyses of the Appointment Process*

Over the past year, the Subcommittee as well as a number of independent experts have analyzed the process used to appoint commissioners and administrators to the nine regulatory agencies covered in this report.²⁶

The staff of the Subcommittee examined the professional experience of those receiving appointments as commissioners or administrators and as non-career executive appointments (NEAs)²⁷ with a view toward developing information which would be useful in determining whether these individuals characteristically have brought to the agencies both technical competence and a balance of viewpoints. Victor H. Kramer, Professor of Law and Director of the Institute for Public Interest Representation²⁸ at Georgetown University, and James M. Graham, an attorney and former graduate fellow at the Institute, studied the process by which 51 men and women were appointed to the

²⁵ U.S. Congress, Senate, Comm. on the Judiciary, Subcomm. on Constitutional Rights, Federal Data Banks and Constitutional Rights, *Federal Data Banks and Constitutional Rights*, Part III, Vol. 6 (Committee Print), 93d Cong., 2d sess., Washington, U.S. Government Printing Office, 1974, pp. 3499-3512.

²⁶ *Supra* note 4.

²⁷ See p. 460 for the definition of NEAs.

²⁸ The Institute for Public Interest Representation is funded by the Ford and Calleper Foundations.

Federal Trade and Communications Commissions from 1953 to 1974. Mr. Kramer presented his findings at a joint hearing before the Subcommittee and the Senate Committees on Commerce and Government Operations on November 6, 1975.

At the request of the Subcommittee and the Senate Committees on Commerce and Government Operations, David Cohen, President of Common Cause, also reviewed the appointment process and presented his analysis and recommendations with respect to the quality of regulators at the joint hearing on November 7, 1975. Other important witnesses are cited in the introduction and below.

A. SUBCOMMITTEE STAFF STUDY

The Subcommittee obtained from the nine agencies biographies of all 108 commissioners and administrators appointed and confirmed since fiscal year 1961, almost evenly divided between Democratic and Republican administrations. The Subcommittee also obtained from the agencies biographic data on the persons appointed to non-career executive positions during the last 5 years.

The professional experience of those receiving appointments as commissioners or administrators and as non-career executives was analyzed to develop information useful in determining whether these persons characteristically have brought to the agencies both the technical competence and the balance of viewpoints which are the prerequisites of good regulation.

In analyzing the data, the staff used the following guidelines:

(a) The official was considered to have "demonstrated a sensitivity to the interests of consumers" if he had participated, in either a full-time or part-time capacity, in any activity or organization promoting a consumer, environmental, or conservationist cause. The criterion contemplated Government service as well as private activities.

(b) Employment in the regulated industry was considered to include not only employment directly by firms engaged in the producing activity itself but also employment in enterprises which worked to further industry interests, such as law firms and consulting companies.

(c) In characterizing the prior employment of those individuals who had served in a variety of positions before appointment, a judgment on the type of employment was based on the length of time spent in the various positions, with greater weight given to time spent in recent positions.

Most of the information was developed from the Subcommittee staff's analysis of the biographic data provided by the agencies. In some cases, the staff relied on the agencies' own determinations, as reported in their replies to the Subcommittee's June 1975 questionnaire.²⁹

The staff did not attempt to link the prior professional experience of individual regulators with their subsequent performance in the agencies. Nor does this report imply that professional experience of itself is necessarily the only accurate indicator of the regulator's im-

²⁹ Findings pertaining to the NEAs are based on data obtained from only seven of the nine agencies: FCC, ICC, NHTSA, CPSC, FPC, FDA, EPA. It should be also noted that nearly half of the sample studied, 26 of 55, consisted of NEAs from one agency, EPA.

partiality. As Lee White testified, "Selection . . . is a relatively blind item. Of far more importance is what happens after you get there."³⁰

1. *Consumer representation.*—During the past 15 years, fewer than 10 percent of the 108 persons appointed as commissioners or administrators of the nine subject agencies had, prior to their appointments, demonstrated a conspicuous sensitivity to the interests of consumers, either as public officials or in private activities. Three of the nine agencies have had no such appointees during the entire 15-year period. (See Table 1.) All the agency chiefs sensitive to consumer interests have been administrators of executive agencies rather than commission chairmen. (See Table 2.)

TABLE 1.—COMMISSIONERS OR ADMINISTRATORS WITH DEMONSTRATED CONSUMER SENSITIVITY, FY 1961-75

Agency	Number	Total regulators appointed
CPSC.....	1	5
FCC.....	1	19
FPC.....	0	16
FTC.....	2	15
ICC.....	0	21
SEC.....	0	19
EPA.....	2	2
FDA.....	1	6
NHTSA.....	3	5
Total.....	10	108

Source: Biographical data provided to the subcommittee by the agencies.

TABLE 2.—CHAIRMEN OR ADMINISTRATORS WITH DEMONSTRATED CONSUMER SENSITIVITY, FY 1961-75

Agency	Number	Total regulators appointed
CPSC.....	0	1
FCC.....	0	4
FPC.....	0	3
FTC.....	0	4
ICC.....	0	6
SEC.....	0	4
EPA.....	2	2
FDA.....	1	6
NHTSA.....	3	5
Total.....	6	35

Source: Biographical data provided to the subcommittee by the agencies.

2. *Regulated industry representation.*—For the same 15-year period, during which less than 10 percent of the commissioner and administrator appointments have been of persons with demonstrated sensitivity to consumer interests, about 35 percent had prior direct or indirect employment in regulated industry. (See Table 3.)

This percentage has not been constant during these 15 years; recently, it appears to have been increasing dramatically. Of the 42 commissioners or administrators appointed in the last 5 years, 22—more than half—came from regulated industry. Of the agencies'

³⁰ *Supra* note 4, at 61.

upper level career appointments, GS-15 and above, 14 percent have come from regulated industry. (See Table 4.)

TABLE 3.—COMMISSIONERS AND ADMINISTRATORS APPOINTED WITH PRIOR DIRECT OR INDIRECT EMPLOYMENT IN REGULATED INDUSTRY, FY 1961-75¹

Agency	Employment in regulated industry		Total regulators appointed
	In last 5 yrs	In last 15 yrs	
CPSC.....	2	2	5
FCC.....	5	10	19
FPC.....	1	2	15
FTC.....	5	8	15
ICC.....	3	4	21
SEC.....	5	10	19
EPA.....	0	0	2
FDA.....	1	2	6
NHTSA.....	0	0	5
Total.....	22	38	10

¹ Information received from agencies in September 1976 shows that 2 of 7 Commissioners appointed in fiscal year 1976 had such prior employment in regulated industry.

Source: Replies to the subcommittee questionnaire of June 1975.

During the 3- to 5-year periods for which NEA appointments were studied, 18 percent of the appointments went to persons who had demonstrated a significant sensitivity to the interests of consumers.²¹

TABLE 4.—PRIOR EMPLOYMENT UPPER LEVEL CIVIL SERVICE¹ PERSONNEL IN REGULATED AGENCIES

Agency	Having prior employment in regulated industry	Total upper level personnel	Percent total from regulated industry
CPSC.....	0	77	0
FCC.....	24	179	13
FPC.....	29	140	21
FTC.....	64	178	35
ICC.....	15	266	6
SEC.....	42	116	36
EPA.....	51	524	10
FDA.....	15	272	6
NHTSA.....	22	165	13
Total.....	262	1,917	14

¹ GS-15 and above.

Source: Replies to the subcommittee questionnaire of June 1975.

3. Short terms served by commissioners of regulatory commissions.—An analysis of the terms of Commissioners at five regulatory agencies disclosed the median lengths of service since they were established or since 1930 were as follows.³²

Agency	Median term service		Term of appointment (years)
	Years	Months	
SEC.....	2	8	5
FTC.....	3	6	5
FCC.....	4	5	7
FPC.....	3	2	5
ICC.....	6	7	7

³¹ It should also be noted that the information used has been obtained from documents provided by the agencies. Although there is no reason to doubt the accuracy of this information, not all of it has been independently verified.

³² Based on information furnished to the Subcommittee by the nine regulatory agencies.

In view of the fact that many of the candidates appointed initially have limited knowledge of the regulatory duties and procedures, they need time enough to gain practical experience and familiarity with the operations. Because of this learning period, they have, for the most part, only 3 or 4 years of their 5 to 7 year terms to perform with full efficiency and effect. Short tenure leads consequently to relative inefficiency and ineffectiveness. Regulatory policy does not remain consistent or constant as commissioners change; the commissioners and staff do not develop mutual understanding; and commissioners cannot provide leadership based on mature experience in the agency.

4. *Subsequent employment of regulators.*—Upon leaving the Government, a substantial number of commissioners and administrators during the 15-year period studied became employed, either directly or indirectly, in the industry they had regulated. At some time during the 5 years immediately subsequent to their departure, 31 of the 93 persons (33%) who have left the agencies during the 15-year period have been employed in the regulated industry. (See Table 5.)

TABLE 5.—SUBSEQUENT EMPLOYMENT OF COMMISSIONERS OR ADMINISTRATORS DIRECTLY OR INDIRECTLY IN REGULATED INDUSTRY, FY 1961-75¹

Agency	Employment in regulated industry			Total leaving agency
	Direct	Indirect	Total	
CPSC.....	0	0	0	0
FCC.....	3	1	4	16
FPC.....	0	2	2	16
FTC.....	0	6	6	15
ICC.....	2	0	2	17
SEC.....	2	10	12	19
EPA.....	0	1	1	1
FDA.....	2	1	3	5
NHTSA.....	1	0	1	4
Total.....	10	21	31	93

¹ Information received from the agencies in September 1976 shows that 6 of 12 Commissioners who left agencies in fiscal year 1976 became employed in the regulated industry.

Source: Replies to the subcommittee questionnaire of June 1975.

We based the analysis on positions held during a 5-year period rather than simply the first job subsequent to departure from the government because many persons, often for ethical reasons, do not immediately accept employment with the regulated industry. As not all agencies compile such information on former employees, this aspect of the Subcommittee staff's study, based on information provided by the agencies, may be conservative. Most probably additional persons currently have positions in the regulated industry unknown to their former agencies.

The extent of one former employee's relations with a regulatory agency was reported in *The New York Times* by David Burnham, August 22, 1976. The data, confirmed by the Environmental Protection Agency, indicated that members of the law firm established by William D. Ruckelshaus, former head of EPA, approached the agency more than 178 times for 20 different clients in 18 months of 1975 and 1976. This number includes only those exchanges documented: 98 telephone conversations; 38 meetings and meals; 30 letters; and 12 un-

classified. Certain other documents were not among those counted because of the agency's responsibility for protecting the confidentiality of proprietary information from the companies concerned. Five of the nine lawyers who represented Ruckelshaus' clients to EPA were his former employees at the agency. On August 1, 1976, Mr. Ruckelshaus left his law firm to be a vice president of Weyerhaeuser Company.

Former employees of EPA who are familiar with the agency and its personnel are likely to shift the odds in favor of a company in its relations with the agency, even in the process of expediting a ruling. Some may ask whether such services are completely legal and ethical, since they give the firm an edge over competitors. Others may ask if it is fair to former employees to deprive them of the opportunity of exercising skills in a field they know best, although this is a consideration which might have been raised when they entered public service. What concerns the Subcommittee is that such an appearance of cronyism casts doubt in the popular mind on the agency's probity.

Without contradiction from other witnesses, Lee White said that a regulatory officer approaching the end of the term of appointment, or in anticipation of resigning, was subject subliminally to influences to vote in a way to protect future employment. Although Edwards favored longer tenure, such as that provided the judiciary, the Subcommittee doubts that long terms in office would relieve the regulator of these subliminal pressures or give agencies the flexibility they require to adjust policies and priorities to the frequent shifts of a dynamic economy. To ease the passage of former senior officials to private life, assuming they are not engaged by other government agencies, Lee White advanced the suggestion of a halfway house for regulators, giving them a period of 12 months at a place like the Brookings Institution to review their experiences or to expand on ideas which had been deferred in the press of other business at the agency.³³ Whatever the merits of such a proposal, the Subcommittee feels that a simple prohibition of employment in the regulated industry for an arbitrary period, while a necessary first step, does not *by itself* guarantee integrity in the regulator. The prohibition, for that matter, is readily evaded, as Dungan testifies.³⁴ The status of the office deserves a positive approach as well, such as continuing employment in a comparably prestigious post.

5. Government as a source for regulators

During the periods studied, more than half of the commissioners, administrators, and NEAs have been persons of substantial Government experience. Slightly less than half of those appointed as commissioners and administrators have been career civil servants or other Government staff, State or local government officials, or former Members of Congress. (See Table 6.) Similarly, slightly less than half of the heads of agencies (administrators and commission chairmen) were formerly in high positions in the Government. (See Table 7.) Of the NEAs, approximately 60 percent had been career civil servants.

³³ *Supra* note 4, at 72.

³⁴ *Id.* at 71.

TABLE 6.—PRIOR EMPLOYMENT OF INDIVIDUALS APPOINTED COMMISSIONERS OR ADMINISTRATORS OF REGULATORY AGENCIES, FY 1961-75

Agency	Private sector (total 56)					Public sector (total 52)					Total
	Regulated industry	Industry	Law practicing before Com-mis-sions	Other private practice of law	Certified public account-ant	Edu-cator	Career Federal service	Profes-sional staff of the Con-gress	Mem-ber of Con-gress	State gov-ern-ment	
CPSC.....	2					1	2				5
FCC.....	6		4	3			2	2	1	1	19
FPC.....	1	1	1	2		1	2	2		5	16
FTC.....			8	2			4			1	15
ICC.....		2	4	3			2	5	1	4	21
SEC.....			9		1		5	1	3		19
EPA.....							1			1	2
FDA.....	2					1	3				6
NHTSA.....		1				1				3	5
Total.....	11	4	26	10	1	4	21	10	6	15	108

Source: Biographical data provided to the subcommittee by the agencies.

TABLE 7.—PRIOR EMPLOYMENT OF CHAIRMEN AND ADMINISTRATORS OF REGULATORY AGENCIES, FY 1961-75

Agency	Private sector (total 19)					Public sector (total 16)				
	Lawyers practicing before commis-sions	Other private practice of law	Regu-lated industry	Industry	Edu-cators	Career Federal service	State gov-ern-ment	Member of Congress	Profes-sional staff of the Congress	
CPSC.....			1							
FCC.....	1	3								
FPC.....	1					1				1
FTC.....	1	1				2				
ICC.....	2					1	1	1		1
SEC.....	2				1					
EPA.....						1	1			
FDA.....			2		2	2				
NHTSA.....				1	1		3			
Total.....	7	4	3	1	4	7	5	2		2

¹ Until 1969, the Chairman of ICC was elected by the members of the Commission; after 1969 the Chairman was appointed by the President.

Source: Biographical data provided to the subcommittee by the agencies.

6. *Summary of findings.*—In summary, the Subcommittee staff's findings are:

a. Only a small minority of commissioners, administrators, and NEAs appointed during the period studied have, prior to their appointment, demonstrated a significant sensitivity to the interests of consumers.

b. A sizable percentage of those appointed commissioners and administrators during the last 15 years have been persons from the regulated industries. This proportion has increased dramatically in recent years.

c. Many commissioners fail to serve their full term of office.

d. Substantial numbers of commissioners and administrators have taken positions in the industries they regulated at the conclusion of their service.

e. A majority of those appointed commissioners, administrators, and NEAs were public officials of one sort or another prior to their appointment.

B. APPOINTMENTS TO THE FEDERAL TRADE COMMISSION AND THE FEDERAL COMMUNICATIONS COMMISSION

In November 1975, Kramer and Graham testified on their study of 51 appointments to the Federal Trade Commission and the Federal Communications Commission from 1953 to 1974.

In this study,³⁵ Kramer found that partisan political considerations dominated the selection of regulators rather than the factors which one would normally believe to be significant such as competence, experience, and policy or attitude. He believes that, because of political criteria of selection, regulatory agencies have been unable to perform their functions well. The talents possessed by the majority appointed are not those needed to assure efficient and effective operations by the regulators.

Kramer also concluded, as did the Subcommittee Staff Study, that only a few of the individuals appointed as commissioners of regulatory agencies demonstrated, prior to their appointment, a significant sensitivity to the interest of the consumers.³⁶

He noted also that prior to 1973, a Presidential nominee could be confident of appointment. This situation changed about 2 years ago when the Senate Commerce Committee intensified its concern with the selection of heads of regulatory agencies. The changing attitude of the Senate was expressed in 1973 in the refusal to approve William Morris for the Federal Power Commission. The principal reason cited was the professional relationship between Morris and the industries he would have regulated. As further evidence of this changed attitude, the Senate Commerce Committee now conducts its own independent investigations of nominees and gives more intensive consideration to nominees during confirmation hearings.³⁷

As to the qualities that prospective regulators should possess, Kramer suggested: (1) an ability to act independently but still use the public interest as a guide; (2) a demonstrated sensitivity to consumer and minority needs; (3) a demonstrated concrete interest in the work of the agency; (4) a high standard of personal integrity and understanding of the ethical responsibility of his office; and (5) a specific knowledge of the work of the commission prior to appointment.

Flanigan, White, and Dungan doubted that criteria in themselves would be sufficient to assure good performance by chosen candidates. Flanigan also cautioned that the form of the process might not be the substance. Both Flanigan³⁸ and Dungan³⁹ commented that candidates should be judged not on the basis of their apparent or professed affiliations, whether for industry or consumers, but on basic qualities

³⁵ The complete study was subsequently published as a committee print by the Senate Committee on Commerce "Appointments to the Regulatory Agencies—The Federal Communications Commission and The Federal Trade Commission (1949–1974)," 94th Cong., 2d Sess. (Committee Print 1976).

³⁶ *Supra* note 4, at 25.

³⁷ *Id.* at 23–24.

³⁸ *Id.* at 57.

³⁹ *Id.* at 62.

of intelligence and integrity. White's prescription, as once relayed to the Chairman of the Civil Service Commission, John Macy, was,

{First . . . find somebody who is ruthless as hell. Second, you find somebody who knows something about the subject. Third, you ought to get somebody who works nicely with people. Fourth, you ought to get somebody who goes along with the Chairman. If the first three don't work, the fourth is the one that makes all the difference.⁴⁰

The Subcommittee believes that, if the President conducts his research for qualified individuals on a diligent and continuing basis along the lines suggested below, capable commissioners who possess the necessary qualities can be found. Rarely if ever do nominees reject an appointment to a Commission for lack of interest.

With respect to the search for qualified nominees, Kramer suggested structural changes in the appointment process, such as: (1) A prominent office solely concerned with developing well-publicized criteria for selecting nominees and maintaining a list of individuals qualified; (2) Attentive monitoring by the Congress of the appointment process; and (3) Announcements of vacancies, to encourage expression of public views.

The Subcommittee grants that, as the intent of structural changes may be frustrated, oversight of the appointment process will be difficult, but we believe the Congress is accustomed to coping with such difficult tasks.

Common Cause found, as did others, that political patronage in the selection process conflicts with the need for a systematic and uniform process for finding highly-qualified regulators. To illustrate the lack of system in the appointment process, David Cohen noted that:

A nominee to the Federal Communications Commission, when asked during his confirmation hearings how he was qualified to regulate the communications industry, replied, "Senator, I don't know anything about communications. I came to Washington expecting to be appointed to the Federal Power Commission. (Cited in *The Regulators* by Louis Kohlmeier, p. 48.)

Common Cause concurs with others that with the notable exception of the work of the Senate Commerce Committee, regulatory appointees have not been evaluated on the basis of well-defined standards. Common Cause believes also that the industry regulated by an agency plays a major role in approving nominees suggested by the White House.

Flanigan urged "that we stop disqualifying anyone related to the activity which the commission is supposed to regulate, on a presumption of guilt."⁴¹ But the Subcommittee Staff Study found that the large percentage of commissioners and administrators from regulated industry appointed since fiscal year 1961 increased dramatically after fiscal year 1970. (See Table 3.)

Upon leaving the government (as noted above) a substantial number of commissioners and administrators were employed, either directly or indirectly, by the industry they had regulated. (Table 5.)

In order to improve the process for selecting regulators, Common Cause recommends that the Congress should develop standards for candidates to head regulatory appointees and should carefully evaluate nominees by these criteria.

⁴⁰ *Id.* at 59.

⁴¹ *Id.* at 57.

Common Cause also believes that further consideration should be given to such concepts as Public Interest Talent Banks, Nomination and Qualification Panels, and an Advisory Committee on Personnel which could promote the appointment of qualified regulators.

Basically, each of the concepts are methods of obtaining additional input into the selection process and broadening the search for qualified candidates so that environmental, consumer, and other representatives of the public interest may share in the selection process no less than the people to be regulated.

Being doubtful of proposals for structural or legislative reform of the appointment of regulatory officials, Lee White⁴² put the burden of improving regulatory performance on the motives of those who select and approve the nominees in the present political process. In this connection, Dungan observed, "The political process . . . operating at its best, is characterized by restraint."⁴³

The Subcommittee believes that structural changes and oversight will serve to restrain political excesses, however motivated.

C. APPOINTMENTS OF PROFESSIONAL STAFF IN REGULATORY AGENCIES

1. *Developing a career regulatory staff.*—Professor Theodore J. Lowi, Cornell University, testified as to the importance of senior career personnel:⁴⁴

In any case, since the conduct of most regulatory processes is in the hands of personnel at a level just below the political appointees, concern for the quality of regulators should focus there, with the hearing examiners, councillors and investigators. At this level, it would of course be extremely helpful if regulatory agencies were freed by Congress from all constraints of the Civil Service laws, allowing agencies the chance to recruit vigorously and to offer salaries commensurate with the salaries paid to lawyers and other technicians in the regulated industries. The experience of TVA might be instructive in this regard. Marginal improvements could also be made in the regulatory process by training lawyers in the economics and technology of the regulatory agencies in which they serve, and at the same time to equip the non-lawyer technical personnel with more knowledge of law and legal procedure. The Federal Trade Commission is at present studying the possibilities of expanded use of economists in FTC decisions; this bears watching closely, since good regulators must always be intimately familiar with the industries, sectors, trades, or groups over which their agencies have jurisdiction.

Yet, in my limited experience, our regulatory personnel are by and large quite well equipped in many of these respects. They tend to come from good universities and have fairly good backgrounds. They are given many opportunities to advance in their government careers by taking additional course work. And it is an unusual bureau chief who does not reward career-related training. Unless and until the salary scale is brought more into line with private industry, the only substantial way I can imagine improving the preparation and training of prospective regulators is to provide them with specialized training schools, as the French do with their *Grandes Ecoles*. The French have such an advanced technical graduate school for each of the major ministries in the national government. There is little question but that the products of these advanced training schools rate high in training and in loyalty to the mission of the agency in which they are trained to serve. But there is a heavy price for this kind of reform. Such training schools or academies for each ministry tend to produce rigid career channels, favoritism within the *corps*, administrative myopia, and domination by Paris, where virtually all of these schools are located.

⁴² *Id.* at 73.

⁴³ *Id.* at 63.

⁴⁴ *Id.* at 15.

Mr. Lowi's comments on the importance placed on salary as opposed to work satisfaction is belied by Subcommittee staff surveys of career employees who left the agencies within the past 5 years, which indicate that work dissatisfaction was often the principal cause of regulators leaving the Federal service or transferring to other agencies. (See Table 8.)

TABLE 8.—REASONS FOR LEAVING CITED BY FORMER EMPLOYEES OF 9 REGULATORY AGENCIES¹

Agency	Job frustration	Lack of money and promotion opportunity	Accepted better job	Others	Totals
CPSC.....	3	0	5	0	8
FCC.....	11	4	13	6	34
FPC.....	6	1	13	13	33
FTC.....	11	13	32	24	80
ICC.....	12	8	16	7	43
SEC ²	0	1	4	3	8
EPA.....	10	4	13	15	42
FDA.....	4	2	7	3	16
NHSTA.....	2	1	1	4	8
Total.....	59	34	104	75	272

¹ Based on responses of those attorneys, GS-11-14, and executives, GS-15's and above, that left the agencies between fiscal years 1971-75.

² Does not include attorneys.

Source: Survey by Subcommittee on Oversight and Investigations, Apr. 5, 1976.

Of those responding to our inquiries, 21.7% cited job frustration in general. Half of these complained that they were not able to enforce the agency's mandate. Only 12% cited the lack of income and job opportunity. If the number who left for a better job (38%) were attracted by something other than an increase in money, a reasonable assumption, considering that so few complained of a lack of money or advancement—it could be inferred that more than half left because they were dissatisfied with the agency's performance. In any event, the salary levels clearly were not unsatisfactory to the majority of those who left.

White suggested that if the regulatory agencies combined to encourage joint meetings of their senior officials for both social and professional purposes, the work might become more satisfactory and effective.

Even a glance at the personnel management patterns used to develop *policy* experts in the armed services and in the Foreign Service indicates by contrast the lack of attention to career development in regulatory agencies. A personnel management pattern for Federal regulators which includes substantial in-service training, development of a career pattern for movement between Federal and State regulatory agencies, full utilization of Federal-State cross-training programs to send promising regulators to State commissions and universities with pertinent programs, and development of special courses at the Federal Executive Training Institute merits careful exploration by the Civil Service Commission and the agencies concerned.

2. *Noncareer positions in regulatory agencies.*—Regulatory agencies employ two categories of staff employees who are not subject to usual Civil Service Commission hiring procedures: those in non-career executive assignment (NEA) and Schedule C positions.

In 1953, Executive Order 10440 established for the first time a non-career category of positions called Schedule C. Approval of candidates and their qualifications for these positions was the responsibility of the agencies, not the Civil Service Commission. In 1958, with the passage of Public Law 85-462, the Congress directed the Civil Service Commission to be responsible for approving the qualifications of persons for both competitive and excepted positions in grades GS-16, 17, and 18.

Executive Order 11315 of 1966 established the Executive Assignment System and spelled out the criteria for determining which executive positions are appropriately non-career executive assignments (NEAs). After 1966 NEA positions, with a slightly modified definition, superseded Schedule C positions in GS-16, 17, and 18.

The conditions under which the Civil Service Commission may approve the establishment of an NEA position are found in Title 5, section 305.601 of the Code of Federal Regulations which states:

(a) When, after consulting the agency concerned, the Commission determines that the requirements of this section are met, it may authorize an agency to fill a position by noncareer executive assignment in the excepted service without following the procedures required for making career executive assignments.

(b) To qualify to be filled by noncareer executive assignment, a position must be one whose incumbent will:

1. Be deeply involved in the advocacy of Administration programs and support of their controversial aspects;

2. Participate significantly in the determination of major political policies of the Administration; or

3. Serve principally as personal assistant to or adviser of a Presidential appointee or other key political figure.

(c) A position does not qualify to be filled by noncareer executive assignment if its principal responsibility is the internal management of an agency, or if it involves longstanding recognized professional duties and responsibilities resting on a body of knowledge essentially politically neutral in nature.

(d) in determining the positions to be filled by noncareer executive assignment under paragraph (a) of this section the Commission shall:

1. Limit the number of positions excepted to a relatively small proportion of the positions in the agency in GS-16, 17, and 18, taking into consideration the size of the agency and the nature of its program; and

2. Define the area of the agency's activity in which noncareer executive assignments would be appropriate and specify organizational levels, as distinguished from grade levels, below which noncareer executive assignments would be inappropriate.

The critical element a regulatory agency must establish to obtain approval of an NEA position from the Civil Service Commission is the requirement that an individual occupying an NEA position must be prepared to "be deeply involved in the advocacy of Administration programs and support their controversial aspects."

The process for approval of an individual appointed by an agency to an NEA position is as follows.⁴⁵ The agency submits a nominee's name and qualifications for the NEA position to the White House. The White House then determines whether the candidate is suitably supportive of Administration policies and is likely to be able to carry out the substantive duties and responsibilities of the position for which he is considered. If the White House is satisfied, it notifies the CSC which approves the technical qualifications of the candidate and the agency, indicating that the individual has met its requirements. The

⁴⁵ *Supra* note 20, at 13.

CSC withholds approval of the NEA appointment until it has received approval by the White House.

3. *Schedule C appointments.*—Schedule C appointments, with some exceptions for Executive level positions,⁴⁶ as noted above, include positions below GS-16. Schedule C positions are, for the most part, special assistants, confidential aides, and persons who have unusual personal qualities required by a presidential appointee or other high level executive appointee. The other essential difference between a Schedule C position and an NEA position is that technical qualifications for Schedule C positions are approved by the agencies instead of by the Civil Service Commission and the White House.

4. *Number of non-career staff positions in regulatory agencies.*—In the nine regulatory agencies discussed in this report, there are 49 NEA positions and 94 Schedule C positions. EPA has by far the largest number: a total of 41. The following schedule⁴⁷ shows the number and distribution in each agency.

Agency	NEA positions	Schedule C positions	Total
CPSD.....	1	13	14
FCC.....	4	3	7
FPC.....	5	28	33
FTC.....	8	4	12
ICC.....	1	12	13
SEC.....	5	12	17
EPA.....	23	18	41
FDA.....	1	1	2
NHTSA.....	1	3	4
Total.....	49	94	143

Three of these agencies, FDA, EPA, and NHTSA, are headed by an administrator, not by a commission. Accordingly, their status is so identified with the Executive Branch that they have less independence than the other six. Whether their independence is so limited as to justify a large number of NEA appointments is an issue that warrants close study. To the extent that regulatory duties are concerned, the Subcommittee believes they should be completely independent.

5. *Conflict between the independent status of regulatory agencies and the political approval of non-career staff.*—One of the basic Civil Service requirements for an NEA position is that the incumbent be deeply engaged in advocacy of Administration programs and supportive of its controversial aspects. To the extent that advocates of Administration's programs are appointed to top positions in the regulatory agencies, the congressionally chartered independence of the regulatory agencies is diluted.

Regulatory commissions generally use NEA personnel to fill certain kinds of positions: the executive director, general counsel, secretary to the commission, and division directors or bureau chiefs. Comparable positions are not consistently categorized as NEA posts in all agencies. For example, the Secretary to the Federal Trade Commission is currently NEA, but secretaries for five comparable agencies are career

⁴⁶ Such as the Commissioner of Customs in the Department of the Treasury, the General Counsel in the Office of the Secretary of the Army, and the Commissioner of the Food and Drug Administration.

⁴⁷ *Supra* note 32.

executives. The following schedule ⁴⁸ discloses executive positions as NEA or career :

Position	Agencies					
	CPSC	FCC	FPC	FTC	ICC	SEC
Executive director.....	CE	CE	NEA	NEA	NEA	NEA
General counsel.....	CE	NEA	NEA	NEA	CE	NEA
Secretary.....	CE	CE	CE	NEA	CE	CE
DD/BC.....	CE	CE/NEA	CE/NEA	NEA	CE	CE/NEA

CE = Career executive, DD/BC = Division director or bureau chief.

The Subcommittee believes that the positions listed above are concerned principally with internal management of agency policy. Their professional duties and responsibilities rest on a body of knowledge essentially neutral as to political partisanship. Moreover, the responsibilities of regulatory agencies are such that its employees, at all levels, must be objective and impartial in their decision-making and that they have substantial experience in the agency's field as a basis for sound judgment. Clearly, these positions require career executives rather than NEA advocates.

Not every executive position can be as clearly categorized. Because agencies with a single administrator (EPA, FDA, and NHTSA) report directly to the President, their chiefs could be strongly partisan supporters of Administration programs or significant partners in major political policies. Their positions can, in keeping with Civil Service regulations, be classified NEA, in contrast to positions principally concerned with internal management or technical matters. The Subcommittee believes that the principal duties of the 10 Regional EPA Administrators are concerned with internal management and should be career positions, immune to party pressures.

IV. Conclusions and Recommendations

The need for excellence in the quality of commissioners and administrators for both independent and executive branch regulatory agencies is critical. Their leadership profoundly affects the operations and management of the regulatory agencies and their abilities to protect consumer interests and promote competition.

In effect, the duties of the President and the Congress in selecting and appointing a candidate for the weighty role of regulator are akin to those conceived by the authors of the Constitution for the Electoral College, a representative body delegated to select the few who are supremely qualified to serve their country as national leaders. As we have noted, the regulator combines the functions of the legislator, the executor, and the judge, subject only to the limitations and oversight imposed by the three traditional branches of government. The President and the Congress have these solemn obligations: to give the task of selecting and appointing each regulator their most serious and careful attention; to consider gravely all that the choice implies; and to assure the regulatory agencies of the guidance and support they require for effective performance of their mandates.

⁴⁸ *Supra* note 32.

A. CRITERIA OR STANDARDS FOR APPOINTMENT

Granted that there can be no absolute certainty that a new commissioner or administrator of a regulatory agency will do well, the development of criteria and standards for candidates will increase the probability that those chosen will be superbly qualified. Moreover, if the standards and criteria are well publicized and candidates are obliged fully to demonstrate their qualifications, it is the less likely that purely political preference will dominate the selection.

Commenting on the futile efforts of the White House to place political appointees in the Consumer Product Safety Commission, discussed in that chapter, a 1975 House Report said, "[P]olitical clearance is totally inappropriate for an independent regulatory agency."⁴⁹

Among the standards or criteria the Subcommittee favors are:

(1) A fair distribution of representative interests on each commission, such as one third for government, one third for users or consumers, and one third for industry.

(2) A keen awareness of the public interest on the part of every appointee.

(3) Specific knowledge of or demonstrated interest in the work of the regulatory agency.

(4) Administrative and technical competence to exercise the responsibilities of the regulatory agency.

(5) Unquestionable personal and professional integrity.

(6) A firm commitment to enforce and conform to the laws applicable to the regulatory agency.

The Subcommittee recommends that the White House and Senate Committees responsible for scrutinizing nominees should, after public comment, develop and publish criteria for appointment of commissioners and administrators of regulatory agencies.

B. BROADENING THE SEARCH FOR QUALIFIED INDIVIDUALS

The Subcommittee sees merit in suggestions that a special office be created or an advisory qualification panel be appointed by the President to suggest names to the President before he nominates a candidate. The duties of this panel or office would apply only to regulatory agencies. Its staff would compile and maintain a list of individuals qualified for agency positions and issue public statements of the criteria for selection. The list should be developed by soliciting all interested parties, including regulated industry, environmental, consumer, and others. A vital duty would be to master a knowledge of the functions and objectives of the regulatory agencies, and monitor each so that the office will be aware of agency needs and the talents they require. The Subcommittee recommends that the search for qualified candidates be broadened.

C. ENCOURAGING PUBLIC PARTICIPATION IN THE SELECTION PROCESS

The Subcommittee believes that the office that is proposed for suggesting potential nominees to the President should do everything in its power to open up the process to public participation. Vacancies

⁴⁹ H. Report No. 325, 94th Cong., 1st sess. (1975), p. 16.

should be announced as far in advance as possible. When vacancies occur on short notice, at least a month should be allowed for selecting a nominee. The office should be accessible to interest groups of every kind. The Subcommittee also sees much merit in the suggestion that the White House be required to maintain logs of all communications with outside parties concerning nominees for appointments to a regulatory agency. These logs should be submitted to the appropriate Senate committee at the time the President submits the nominee for confirmation. Such a record would go far to open up the processes of selecting and clearing nominees. The subcommittee recommends that the secrecy surrounding the appointment process be abandoned so that there may be broad participation in the selection of nominees.

D. STRENGTHENING THE PROFESSIONAL STAFF

The Subcommittee recommends that the regulatory agencies, together with the Civil Service Commission, examine the personnel practices of the Federal regulatory agencies with a view towards establishing a system which would encourage progressive growth of Federal regulators. Such a system should include the opportunity to broaden experience through assignments to other regulatory agencies and in-service training. We suggest that the regulatory agencies consider the experiment of holding joint meetings for social and professional purposes or techniques used by other agencies to develop experts in management and policy.

With respect to the non-career positions in the independent regulatory agencies, the Subcommittee recommends that there be no NEA positions assigned to these agencies and that Schedule C positions be limited to confidential secretaries or personal assistants to the Commissioners or Administrator. There is no basis for requiring political clearance of any employee of an independent regulatory agency. It would be proper to allow a Commissioner to select his staff on a non-competitive basis and for the Commissioners to select a limited number of senior employees for key positions.

The Subcommittee considers that such measures to ensure the quality of the staff will also support efforts to direct and operate the agencies as the Congress intended.

Other factors affecting the quality of performance by regulatory agencies also have come to our attention, such as gratuities or holdings that give the appearance of a conflict of interest. As these are of lesser consequence compared to the importance of selecting qualified officials, they are discussed in an appendix to this report.

Of more significance is the interchange of personnel between regulatory agencies and regulated industries, an almost invisible process that could be compromising. The Subcommittee recommends that former Commissioners or Administrators be forbidden for two years after resignation from accepting employment in a regulated industry as an employee, advisor, or attorney, and that other former employees be subject to the provisions of 18 U.S.C. 207, strengthened along the lines proposed in Chapter 17 (see pp. 553-4).

We also deplore the tendency of Commissioners to leave office before they have served their appointed term, for reasons indicated earlier. Complex questions of policy and regulation cannot be handled

effectively if a rapid turnover deprives the regulatory agencies of experienced leadership, consistent policies, and well-established staff relationships with commissioners.

The Subcommittee, therefore, recommends that each regulatory commission ascertain the reasons why so many commissioners leave before their terms expire so that a corrective program can be developed. Each regulatory commission should submit to the Congress a copy of its study with remedial suggestions.

We suggest the agencies review thoughtfully those suggestions by our witnesses for improving the status or prestige of senior staff and commissioners or administrators and that they seek experimental validation of the proposals, especially those likely to encourage formation of a career corps dedicated to public service.

The Subcommittee recommends that the Civil Service Commission develop an affirmative program that will encourage Commissioners to serve their full term.



FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 13

INCREASING PUBLIC PARTICIPATION

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CHAPTER 13

INCREASING PUBLIC PARTICIPATION

Federal regulatory agencies have been criticized repeatedly for the lack of "public participation"¹ in their decisionmaking processes.² On the basis of its extensive review of the nine agencies in this Report, the Subcommittee concludes that an increase in public participation will materially improve the work of those agencies. The Subcommittee believes that adoption of some of the recently proposed mechanisms to increase public participation will yield information that enhances the agencies' ability to serve the public interest. The need for further public participation is evident in studies of three agency decisions and in our general review of the nine agencies discussed in this Report. Different proposals for increasing public participation are evaluated below as they apply to each of the nine.

1. Examples of Need for Additional Public Participation

The Subcommittee rejects the arguments of those who believe that all interests are adequately represented in the regulatory process.³ The Subcommittee's analysis of many agency decisions indicates that a substantial proportion of those matters lacked effective participation by so-called "public" spokesmen, those who represent interests other than the directly regulated firms. The effect of this in many instances was that the decision rendered failed to consider important facts or policies and therefore did not reflect the public interest. Our review further indicated that where genuine public participation did occur, it helped to inform the agency about interests that should be considered. Whether or not such advocacy had a demonstrable effect upon agency decisions, and sometimes it did, its presence was a restraint on arbitrary action.

Those who oppose mechanisms for increasing public participation argue that agencies presently consider all relevant interests⁴ and that

¹ The term "public participation" is generally defined as input by persons or groups which do not themselves have a large and direct economic interest in the decision. In fact, "public interest" groups often represent small and fragmented private interests, as for example, when the Sierra Club represents those who wish to preserve a wilderness area. See Lazarus & Onek, *The Regulators and the People*, 57 Va. L. Rev. 1069, 1077 (1971).

² See generally Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 Mich. L. Rev. 511 (1961); Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 Geo. L. J. 525 (1972); Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 Geo. L. J. 1095 (1971); Gellhorn, *Public Participation in Administrative Proceedings*, 18 Yale L. J. 359 (1972); Johnson, *A New Fidelity to the Regulatory Ideal*, 59 Geo. L. J. 869 (1971); Lazarus & Onek, *supra* note 1; Nell, *The Economics and Politics of Regulation*, 57 Va. L. Rev. 1016 (1971); Williams, *Public Participation in Locating Facilities Dedicated to Public Use*, Pub. Util. Fort. Sept. 16, 1971, at 101; Note, *Federal Agency Assistance to Impecunious Intervenor*, 88 Harv. L. Rev. 1815 (1975).

³ See e.g., testimony of John A. Stuart, Director, Marketing and Trade Regulations, National Association of Manufacturers in *Hearings on S. 200 Before the Senate Comm. on Government Operations*, 94th Cong., 1st sess. 217 (1975); Minority Views of Senator Allen in *Consumer Protection Act of 1975, Report of the Senate Comm. on Government Operations to Accompany S. 200*, S. Rep. No. 66, 94th Cong., 1st sess. 67 (1975).

⁴ Stuart testimony, *supra* note 3, at 219-23.

public participation will only delay agency proceedings.⁵ Our study has convinced us that all too often important interests have not been considered sufficiently (as demonstrated below) because there has been no effective way to present those views forcefully. Further, while increased public participation could consume decisionmaking time in certain instances, the time will not be significant⁶ and will in any case be well worth the cost because the result will be decisions which truly reflect the public interest.

The Subcommittee cites three among many examples of the significance of inadequate public participation in agency decisions. A decision of the Food and Drug Administration exposed citizens to severe health risks without public participation at critical stages. The National Highway Traffic Safety Administration where, in considering a burn standard for interior car fabric, would probably have issued a totally inadequate standard favored by the industry had it not been for a public group concerned with passenger safety. Although the final standard fell short of ideal, the group's representations added to the public's safety. Third, the Federal Power Commission, in a recent 3 to 1 decision,⁷ raised the wholesale rate for "new" interstate gas from 52¢ per thousand cubic feet (MCF) to \$1.42 per MCF, an action that will cost consumers an estimated \$1.5 billion in the first year.⁸ Without direct, effective consumer participation in this decision, issues were not fully developed. As a result, the Commission appeared to deviate from its duty to relate the price to the cost of production. The national rate for "new" gas,⁹ if not modified on rehearing,¹⁰ will be costly to the consumer and the economy. In the words of the one Commissioner who dissented, the new rate "is too high. The costs do not support the rate, the impact is excessive."¹¹

A. CHYMOPAPAIN AND THE FOOD AND DRUG ADMINISTRATION

The Subcommittee's review of the FDA's decision on chymopapain is discussed in detail in Chapter 8. Chymopapain, an enzyme used to relieve lower back pain as an alternative to surgery, was approved by the FDA in 1963 as an Investigational New Drug and was subsequently used by about 15,000 patients.¹² Several years after its introduction, physicians reported side effects to its use, such as allergic reactions, possible paraplegia, and even death from anaphylactic shock.¹³ One study of 386 patients who used chymopapain reported 59 injuries, 35 of them severe.¹⁴ On this basis, of the 15,000 patients

⁵ See Minority Views of Senator Allen, *supra* note 3, at 76-77.

⁶ See, e.g., *Public Participation in Government Proceedings Act of 1976. Report of Senate Comm. on the Judiciary to Accompany S. 2715*, S. Rep. No. 863 94th Cong. 2d Sess. 10-11 (1976).

⁷ Federal Power Commission, Opinion No. 770 (Docket No. RM75-14), 18 CFR Parts 2, 154, 157, July 27 1976.

⁸ *Id.* at 5. However Subcommittee investigators recently learned that an unreleased FPC staff tally of data submitted by the pipelines shows the first year cost to consumers will be \$2.5 billion.

⁹ "New" gas is defined in the Opinion as: "(1) sales of natural gas made from wells commenced on or after January 1, 1975, and (2) sales made pursuant to contracts executed on or after January 1, 1975, for the sale of natural gas in interstate commerce where such gas has not previously been sold in interstate commerce." *Id.* at 2.

¹⁰ Oral argument on rehearing was conducted on Sept. 16-17, 1976.

¹¹ Opinion No. 770, *supra* note 7, dissenting opinion of Commissioner Smith, at 1.

¹² Food and Drug Administration, Advisory Comm. on Surgical Drugs, "Subcomm. Report on Disease, Chymopapain," June 27, 1973, at 3 [Subcommittee files].

¹³ Briefing of the Subcomm. on Oversight and Investigations by Dr. Bernard Sussman, May 20, 1975 [Subcommittee files].

¹⁴ Study conducted by Drs. William B. Scoville and David Silver, 1973-74, submitted to the Food and Drug Administration, June 1974 [Subcommittee files].

who were injected with the drug, some 2,250 may have suffered injury, 1,388 severe.

Various advisory committees in the Food and Drug Administration (composed of industry, academic, government and other experts) on reviewing such evidence relating to chymopapain in the 1970's, found themselves unable to produce a definitive recommendation.¹⁵ They complained of a lack of usable clinical data, and noted a wide divergence of opinion among the investigators of the drug.¹⁶

Later clinical studies (in 1974 and 1975) confirmed the frequency and severity of the risks.¹⁷ In addition, experiments demonstrated that the drug was no more effective in relieving lower back pain than a placebo. The result of FDA's approval of chymopapain as an Investigational New Drug was that 15,000 patients were exposed to needless risk from a drug which had no truly beneficial value.

There was no public participation in either of the vital stages of FDA's consideration of chymopapain, the 1963 approval for investigatory use or the advisory committee consideration of its general use. A group concerned with safety for patients might have sensitized the FDA to the need for evidence of efficacy prior to the 1963 approval. Even more important, a public group with knowledge of the adverse effects reported in the late 1960's could have aroused the advisory committees to urge that the drug be withdrawn. Instead, the FDA, which monitors thousands of New Drug Applications every year,¹⁸ heard mainly from advocates of the manufacturer, with the predictable result that a decision to seek withdrawal of chymopapain was reached only after evidence of its uselessness prevailed. The public's interest in safe, effective drugs was simply not represented forcefully. Consequently, we estimate there were at least a thousand injuries and several deaths.

B. BURNABLE CAR FABRICS AND NHTSA

From its early days, the National Highway Traffic Safety Administration (NHTSA) has been concerned about fires in automobiles. The National Fire Protection Association estimated in 1975 that there were 640,000 automobile fires in 1974.¹⁹ On October 11, 1967, NHTSA issued an Advance Notice of Proposed Rulemaking concerning the burnability of fabric in cars.²⁰ After further study, NHTSA issued a Proposed Regulation on December 19, 1969²¹ which set a minimum standard of 4 inches per minute as the maximum burn rate for interior fabrics. The standard was to become effective on January 1, 1971.

The automobile companies opposed this requirement. Some argued for a maximum burn rate of 15 inches per minute. During the period for comment on the proposed rule, a public interest group, the Center for Auto Safety (a foundation-funded group which has been active in NHTSA proceedings), filed a petition which proposed a zero burn rate for fabrics in cars, similar to that required in aircraft.²² The

¹⁵ See Chapter 8 (FDA) of this Report, *supra*.

¹⁶ *Id.*

¹⁷ See *id.* at pp. 150-52 and notes.

¹⁸ For example, in fiscal 1976, the FDA received 3,649 NDA's. Staff telephone conversation with Ruth Sherman, Office of Legislative Services, FDA, Sept. 17, 1976.

¹⁹ *Fires and Fire Losses Classified, 1974*, Vol. 69 Fire Journal, Sept. 1975, at 45.

²⁰ 32 FR 14202.

²¹ 34 FR 20434.

²² Center for Auto Safety, Petition for Rule Making re: Motor Vehicle Safety Standard No. 302, Oct. 5, 1970 (Subcommittee files).

Center was concerned lest NHTSA yield to the industry pressure for the 15 inches per minute standard, equivalent, according to the Center, to the burn rate for paper towels.²³ The Center also pointed out that the specified method for testing fabric (by burning it on a horizontal plane) would understate the burn rate as much fabric in a car is vertical.²⁴

The final Rule as adopted by NHTSA on December 29, 1970²⁵ adopted the basic outlines of the proposed regulation. It did not yield to industry pressure for the lesser standard. Although the Center for Auto Safety's proposed zero burn rate and vertical testing proposals were not adopted, the Center's advocacy was instrumental in convincing NHTSA to retain its proposed rule. Had there been other public participation, the agency might have adopted a still safer standard. Because of the consumer contribution, the standard (though not ideal) was adopted and the safety of passengers was enhanced.

C. NATURAL GAS PRICES AND THE FEDERAL POWER COMMISSION

Federal regulation of interstate natural gas prices is discussed extensively in Chapter 10 of this Report (FPC). The most recent and perhaps most significant action was the Federal Power Commission's decision on July 27, 1976 to raise the wholesale price of "new" natural gas from 52¢ per thousand cubic feet (MCF) to \$1.01/MCF for wells drilled during 1973 and 1974 and to \$1.42 for wells drilled after January 1, 1975.²⁶ This action will cost gas customers about \$1.5 billion during the first year alone.²⁷

The decision on this new gas rate was reached without the benefit of any public participation and in fact without any substantial direct contribution from outside the Commission. There was no hearing before the Commission nor was there any other oral presentation of views or opportunity for cross-examination. The entire decision-making process consisted of an analysis by the FPC staff of the various components of the rate for gas and recommendations concerning the final rate. There was no opportunity for any interested person to test the assumptions or the conclusions of the staff in any way. Even more important, there was no opportunity to influence directly the decision of the Commissioners by oral presentation or cross-examination.

The basis of this decision had not been tested for factual weaknesses or challenged for failure to ensure that all interests had been represented. Predictably, the decision had several weaknesses, revealed by the Subcommittee's hearing on the matter on August 27, 1976. The Subcommittee staff found that the Commission may have deviated from its duty to tie the rates for natural gas to its cost of production in at least four ways:

1. Its failure to consider the foreign tax credits in setting the producer tax allowance;

²³ *Id.* at 1.

²⁴ *Id.* at 2.

²⁵ 36 FR 289.

²⁶ Federal Power Commission, Opinion No. 770 (Docket No. RM 75-14), 18 CFR Parts 2, 154, 157, July 22, 1976.

²⁷ *Id.* at 5. But see note 8, *supra*.

2. Its use of the maximum corporate tax rate (48 percent) in setting the producer tax allowance instead of the actual tax burden for gas producers, which has been estimated at approximately 5 percent.²⁸

3. Its failure to consider the \$2 billion in interest-free capital lent to the producers under the "advance payments" program.

4. Its failure to audit or verify the drilling cost data submitted by the industry.

These departures from cost basis could have been raised in a hearing before the Commission, especially if consumer participation had been sufficient. For example, the issue of actual tax liability did not receive sufficient consideration, as the following testimony indicates:

Mr. ATKISSON (Subcommittee Counsel). Did you hold evidentiary hearings in which you required the producers to come forward and face cross-examination with copies of their tax returns and analysis of what the actual tax liability might be?

Mr. DUNHAM (FPC Chairman). Well, the answer to your question is no, but we consider the tax laws to be stated clearly in that regard.²⁹

Dr. David Schwartz, formerly Director of the FPC's Office of Economics testified that:

There is no evidence of the actual tax liability of the producer in this proceeding. Since the original Permian Basin area rate case in 1965, the producers have refused to provide evidence of their effective tax liability.

The elimination—and this is what the Commission relies upon—the elimination of statutory depletion does not, in and of itself, justify a tax allowance. The Commission's own staff has advised that the record is inadequate to reach any conclusion relating to income taxes.³⁰

The Commissioners themselves recognized that the issues were not fully developed at the time of the decision, as Commissioner Holloman noted:

Mr. HOLLOMAN. It is my understanding that the advance payment issue was not raised in any of the comments in the record on this rulemaking but was raised the first time by Commissioner Smith in his dissent. It may be before us on rehearing. I have not looked at the comments that have been filed with respect to the rehearing, but—

Mr. ATKISSON. It was raised by the FPC staff as I stated in my question.³¹

The penalty for the lack of consumer participation was assessed by Morton Simons, a Washington, D.C. attorney who found:

[T]he Commission's adoption of rulemaking to fix nationwide rates first to double and then to triple that doubled re-

²⁸See *Analysis of Tax Data of Seven Major Oil Companies Report of the Permanent Subcomm. on Investigations of the Senate Comm. on Government Relations*, 93d Cong., 2d sess., 4 (1974). That Subcommittee estimated the effective tax for the seven companies for the years 1968-72 with a range between 2.55 percent (1969) and 5.36 percent (1971).

²⁹Testimony of Richard L. Dunham, Chairman, Federal Power Commission before the Subcomm. on Oversight and Investigations, Aug. 27, 1976, at Tr. 56.

³⁰*Id.* at Tr. 154.

³¹*Id.* at Tr. 103.

sult without any evidentiary hearing to be entirely contrary to all of the traditions not only before the Federal Power Commission but I think to our entire system of justice.

I think the reason that you have gotten bad results, and I commend this committee for examining into them today, is in large part because of the method used by the Commission. I think the questioning this morning brought out—time and again you got the response from the Chairman and from the Commissioners that they were not aware of those or they didn't check something or they didn't know something.

If you go through an evidentiary hearing, if you have cross-examination, if you have a decision by the Administrative Law Judge, if you have briefs on exceptions, by the time it gets to the Commission there is some hope they will understand the complexity of the problem they have before them.³²

Thus, the absence of an informed, active consumer or "public" group with the ability to develop fully the issues presented in a direct manner before the Commission may have resulted in a new national gas rate far in excess of what it would have been had such input been presented. While the decision may be challenged on judicial review (indeed, some consumer participants attempted to obtain a stay of the decision in court).³³ consumer comment at the time of the original Commission consideration could have been critical both for persuading the Commissioners and for creating a complete record for judicial review. For lack of effective representation, the consumer may pay an extra \$1.5 billion for gas in one year alone.

II. The Need for More Public Participation

It is widely perceived that many Federal regulatory agencies are closely identified with the industries they regulate.³⁴ Their daily activities often consist of extensive exchanges with members of that industry.³⁵ Consequently, most of the regulators become familiar with conditions in the industry they regulate. Second, the agency may depend on friends in the industry for political support in the presence of criticism by either the Executive or the Congress. Third, the Congressional mandate which established the agency may suggest (or the agency may perceive) that one of the agency's purposes is the promotion of the regulated firms.

Many administrative decisions blend or compromise various interests in order to arrive at a standard which will in theory represent the public interest. For example, the Federal Communications Commission, in setting interstate telephone rates, must consider the interest of telephone consumers in securing the lowest possible rates as well as the interest of the industry in obtaining favorable enough rates to

³² *Id.* at Tr. 126.

³³ *American Public Gas Assoc., et al. v. Federal Power Commission*, Civil No. 76-1694 (D.C. Cir. 1976). The court ordered a stay because the Commission had not ordered refunds if the rate was found unlawful. On August 13, 1976, the FPC ordered that refunds would be given if the rate was found unlawful.

³⁴ See, e.g., Cramton, *supra* note 2, at 45; Lazarus & Onok, *supra*, note 2, at 1070, 1090; Noll, *supra* note 2, at 1028-31; Note *supra* note 2, at 1815-16.

³⁵ See Lazarus & Onok, *supra* note 2, at 1094. See generally J. Landis, Report on Regulatory Agencies to the President-Elect (1960).

attract sufficient capital investment.³⁶ In considering whether to ban a product, the Consumer Product Safety Commission must consider the likelihood of preventable injuries³⁷ as well as the economic effects upon the manufacturers.³⁸ Of course, the Consumer Product Safety Act requires that any product which constitutes an "unreasonable risk of injury" must be banned if no feasible safety standard would protect the public, but in practice the process of setting such a standard generally constitutes a weighing of interests. Similarly, the Food and Drug Administration, in considering a New Drug Application, must weigh the health benefits of the drug against its potentially harmful effects, taking into account possible substitutes.³⁹ Such decisions are especially difficult when the facts are imperfect or in dispute, compelling careful selection of relevant interests and their relative weights.

Industry domination of regulatory decisions is one consequence of its direct and large economic interest in contrast to consumers' fragmented interests. For this reason, consumers have sought support for organized representation in these decisions. On August 25, 1976, the Food and Drug Administration, in response to a petition from Consumers Union, proposed new Rules for the compensation of public participants in its proceedings.⁴⁰ The Consumers Union petition noted that:

Although the interests of the food, drug, cosmetic, and medical device industries are frequently at odds with the interests of consumers of these regulated products, consumer advocacy before FDA is rare, sporadic, and virtually always underfinanced, while the regulated industries maintain continuous and well-financed advocacy directly and through their trade associations. (One measure of this imbalance is FDA's Public Calendar which indicates constant and routine contacts between members of the regulated industries, and only occasional contacts with nonindustry spokespersons.)

In summary, while the act sets forth the rights of any aggrieved person to request and receive a public hearing, and for any interested person to be heard at such hearing, virtually no nonindustry persons have been able to invoke these rights. In practical effect these rights of participation are hollow and the record upon which FDA ultimately bases decisions directly affecting the public is thereby impoverished and untested. As a practical matter, systematic advocacy of diverse points of view is likely to occur only if FDA actively encourages participation by those who are likely to contribute to a fuller, fairer, and more balanced record by reducing the financial barriers to such participation.⁴¹

III. Proposed Mechanisms To Increase Public Participation

Support has been growing for proposals to assure that the previously unrepresented public interests have access to administrative agencies.⁴² It has been recognized that though the legal barriers to public intervention have been reduced substantially in the last 10

³⁶ See, American Telephone & Telegraph, 57 FCC 2d 960, 960-61 (1976); American Telephone & Telegraph, 38 FCC 2d 213, 226 (1972); American Telephone & Telegraph, 9 FCC 2d 30, 52 (1967).

³⁷ Consumer Product Safety Act Section 8, 15 U.S.C. 2057.

³⁸ Consumer Product Safety Act Section 9(c)(1)(C), 15 U.S.C. 2058.

³⁹ See, Federal Food, Drug, and Cosmetic Act Section 505(d), 21 U.S.C. 355.

⁴⁰ 41 FR 35855.

⁴¹ 41 FR 35857.

⁴² See, e.g., "Report to Accompany S. 2715," *supra* note 6.

years,⁴³ the current mechanisms are clearly insufficient to provide effective participation by customarily unrepresented interests. Usually the interest of the individual citizen is too small to justify the cost of participation in the decision.⁴⁴ Although some groups which purport to represent public interests have had some effect,⁴⁵ the general rule is that the many individually small, but in the aggregate, important interests have not been considered in agency decisions. Therefore, positive measures are suggested to support public participation. Although there are variations, the proposals divide into four categories: (1) An independent Agency for Consumer Advocacy (or Agency for Consumer Protection) which could intervene before any agency; (2) public advocate offices within the agencies; (3) fee shifting to public participants; and (4) direct government compensation to public participants.

One approach to increase public participation is the creation of a new Public Advocate Office which could intervene before any agency to represent certain interests. The most significant legislative initiative in this area is the proposed Agency for Consumer Protection (ACP) to represent consumers.⁴⁶ This proposal was passed by both Houses of Congress in 1975⁴⁷ but has not yet been enacted.⁴⁸ The proposed Agency for Consumer Protection would have the authority to intervene in agency proceedings to represent consumer interests as well as to obtain judicial review of agency decisions. The ACP would also have various information-gathering and dissemination functions with respect to issues of interest to consumers. In addition the ACP would be a coordinator of consumer programs in the other agencies.

A second approach to increase public participation is to establish an Office of Public Counsel within each agency to intervene before the agency to represent ordinarily unrepresented interests. It has been suggested that the Public Counsel be appointed by the President for a fixed term to attempt to assure independence from the agency, as is currently the status of the Office of Rail Public Counsel in the Interstate Commerce Commission.⁴⁹ The Public Counsel could have the authority to appeal an agency decision to the Federal courts.

In addition to appearing before the agency, a public advocate office could serve as a resource for public groups which wish to intervene in administrative proceedings. The office could provide information and legal assistance to these intervenors and could also have the function of seeking outside assistance to represent certain interests.

A third approach for increasing public participation in agency proceedings is the "fee shifting" method.⁵⁰ Under this proposal, the cost

⁴³ See *National Welfare Rights Org. v. Finch*, 429 F.2d 725 (D.C. Cir. 1970); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). See generally Comment, "Judicial Review of Agency Action: The Unsettled Law of Standing," 69 Mich. L. Rev. 540 (1971); Note "Selection of Administrative Intervenors: A Reappraisal of the Standing Dilemma," 42 Geo. Wash. L. Rev. 991 (1974).

⁴⁴ Noll, *supra* note 2, at 1030.

⁴⁵ For example, the Office of Communication of the United Church of Christ has affected FCC policies, as has the Citizens Communications Center, a "public interest" law firm.
⁴⁶ "Consumer" is defined as: "any individual who uses, purchases, acquires, attempts to purchase or acquire, or is offered or furnished any real or personal property, tangible or intangible goods, services, or credit for personal, family, agricultural, or household purposes"; S. 200 Section 14(7), 94th Cong., 1st Sess.

⁴⁷ S. 200 was passed by the Senate on May 15, 1975 and was passed by the House of Representatives (as a substitute for H.R. 7575) on Nov. 6, 1975.

⁴⁸ As of September 23, 1976, the bill had not been scheduled for House-Senate Conference.

⁴⁹ Section 304, Public Law 94-210, enacted Feb. 5, 1976.

⁵⁰ See generally Note, *supra* note 2, at 1822-26.

of intervention by a public group would be borne by the economic interests appearing before the agency. This method rests upon the private attorney general theory, which was recently limited by the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*.⁵¹

A fourth method for ensuring public participation is for the government to compensate directly persons or groups which represent an important interest. This could be accomplished by a finding that the group's participation is likely to be useful⁵² or it could be accomplished after the proceeding by a finding that the contribution was compensable.⁵³ Specific amounts could be appropriated to each agency for such purposes or one sum could be used for all agencies.⁵⁴ Such funding need not be limited to costs of appearing before the agency; it could also be extended to the costs of securing judicial review of an agency decision.

IV. Types of Agency Mandates and the Processes of Decision

In order to evaluate the most effective method to increase public participation in an agency, it is necessary to analyze the types of decisions which agencies make as well as how they make those decisions.

The missions of the nine agencies considered in this Report may be grouped into three categories: (1) Setting rates, routes, and entry; (2) setting health and safety standards; and (3) law enforcement to protect consumers or investors.

The Interstate Commerce Commission (ICC), the Federal Power Commission (FPC) and the Federal Communications Commission (FCC), set rates, allocate routes, and control entry. The prime considerations in these decisions are the amount of revenue necessary to attract sufficient capital, the need for additional service, and the effect of additional service upon firms currently providing service.⁵⁵ The mandates of these agencies indicate that they are to be concerned with keeping rates as low as possible consistent with sufficient service. The Natural Gas Act, for example, requires the FPC to set "just and reasonable" rates.⁵⁶ The Federal Communications Act of 1934 speaks of "adequate facilities at reasonable charges."⁵⁷ In the short term, at least, the interest of consumers of such services would be in the lowest possible rates and maximum entry while the current firms providing service would generally prefer the opposite goals. Typically, the decisions on rates and entry determine whether the costs submitted are reasonable and proper and whether a new entrant is desirable and necessary.

In ratemaking cases, the consumer interest in the aggregate is evident, but proposals to increase public participation in such proceed-

⁵¹ 421 U.S. 240 (1975); accord, *Turner v. FCC*, 514 F.2d 1354 (D.C. Cir. 1975). The *Alyeska* court held that a court lacks authority to assess costs against the losing party for the benefit of a "public" participant unless a statute confers such authority.

⁵² See Magnuson-Moss Warranty-Federal Trade Commission Improvement Act Section 202(b), 15 U.S.C. 58, which gives explicit authority to the Federal Trade Commission to make such a finding.

⁵³ S. 2715 utilizes this mechanism in addition to a finding in advance.

⁵⁴ S. 2715 authorizes \$10,000,000 for each of fiscal years 1977, 1978, and 1979.

⁵⁵ See, e.g., B. Schwartz (ed.), *The Economic Regulations of Business and Industry* 17-20 (1973) for a discussion of the origins and reasons for enactment of the Interstate Commerce Act.

⁵⁶ 15 U.S.C. 717e(a).

⁵⁷ Communications Act of 1934 Section 1, 47 U.S.C. 151.

ings should be evaluated in light of several factors. Although consumers seek the lowest possible rates consistent with sufficient service, rate cases often are so long and complex⁵⁸ that it may be difficult for any outside group to represent consumers effectively. Second, because the basic issue in rate-making is allowability of costs, the proponents require knowledge of past principles so that their participation may be more effective. Ratemaking and entry decisions often are built upon a history of rulings so that real influence on decisions can be achieved only by a continued presence in successive hearings.

Health and safety standards are set by the Environmental Protection Agency (EPA), the National Highway Traffic Safety Administration (NHTSA), the Consumer Product Safety Commission (CPSC) and the Food and Drug Administration (FDA). Such decisions necessarily require a balancing of various interests which include the small but widely dispersed interests of affected citizens. In setting standards for air quality,⁵⁹ EPA's determinations depend on such factors as the technology available and the economic effects⁶⁰ as well as the benefits to public health and well-being. The public well being is the most difficult to quantify and therefore most likely to be undervalued. It is here that public participation is helpful as it may tend to define and focus the agency's attention on the interests of ordinary citizens.

Similarly, the CPSC must set standards for the safety of products by balancing the economic interests of manufacturers with the aggregate and various interests of individual consumers. It is difficult for the CPSC to determine the intensity of diverse consumer interests—some consumers will be more interested in safety than others. Since increased safety may often mean increased cost, the CPSC may have to attempt to measure the trade-off between price and safety as viewed by most consumers.

These standards are generally set by the use of a rulemaking procedure.⁶¹ In rulemaking, the agency generally does a preliminary study to determine whether a rule is needed for the subject. The agency then issues a proposed rule which includes the legal authority for the rule.⁶² The comments of interested parties are then received either in writing under the "notice and comment" procedure of rulemaking⁶³ or at a hearing, a phase of "rulemaking on a record."⁶⁴ If

⁵⁸ For example, on Nov. 20, 1970, the American Telephone and Telegraph Co. filed for interstate rate increases amounting to \$545 million annually before taxes. At the FCC's request, AT&T refilled its tariffs to produce an increase limited to \$250 million before taxes and those rates took effect on Jan. 26, 1971. The Commission's investigation of these rates had two phases. Phase I was the determination of a fair rate of return and the Commission's final decision was issued on Nov. 22, 1972 (38 FCC 2d 213). Phase II covered all other aspects of AT & T's overall interstate revenue requirement. The Administrative Law Judge's initial decision on Phase II was issued on July 14, 1976 (Docket No. 19129). The estimated cost to Bell of its participation in Phase II was \$5,939,000 and the cost for the Commission's trial staff \$4,000,000. ALJ's Initial Decision at 8-9 para. 15.

⁵⁹ Clean Air Act Section 109, 42 U.S.C. 1857 c-4; National Emission Standards Act Section 202, 42 U.S.C. 857f-1 *et seq.*

⁶⁰ *Sec. e.g.*, Clean Air Act Section 110(f)(1), 42 U.S.C. 1857 c-5.

⁶¹ *E.g.*, Consumer Product Safety Act Section 9, 15 U.S.C. 2058. An extensive discussion of public participation at the CPSC through the "offer or process" may be found in Chapter 6 (CPSC) of this Report.

⁶² Administrative Procedures Act, 5 U.S.C. Section 553(b).

⁶³ 5 U.S.C. 553.

⁶⁴ 5 U.S.C. 556.

the agency is setting a health or safety standard, the parties may question the need for a rule, or the proper balance between public protection and the economic burden. The issues are factual but also are determined by public policy, with the result that rulemaking often is "quasi-legislative."

The direct economic interest of the regulated firms is large and forcefully put. The aggregate interest of individual citizens, is larger still, but ordinarily, for lack of an advocate, rarely presented. A basic function of many regulatory agencies is to safeguard the aggregate interest.⁶⁵ In its decisions, the agency is not making a clearly delineated choice as in adjudication; rather it is balancing interests in order to choose an appropriate point along a gradient of possible decisions. As it may be difficult for the agency to define the interests of citizens, even in the aggregate, a system of expressing the public interest will help the agency to perform its function.

The most effective public participation in rulemaking activity is provided by an outside group which demonstrates expert knowledge. In contrast to ratemaking and entry decisions, each standard-setting proceeding is in effect a balancing of separate interests. Constant presence in all decisions then is not necessary for consumers. An outside group can serve effectively as an independent advocate.⁶⁶

The third type of agency mandate is law enforcement. The Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC), (although both have other duties as well) take action against those suspected of violating their respective statutes.⁶⁷ In doing so, the Commission must weigh the likelihood that the Act has been violated and that the particular proceeding is worth while.⁶⁸ In certain areas, the two agencies also use regulations to define what constitutes a violation.⁶⁹ Such definitions also ensue from a balancing of interests.

Once the agency decides to bring an action, the interest of the prosecution should be well represented.⁷⁰ Although a public group could in some instances encourage the agency to expedite its proceedings, it appears that other factors (such as Congressional oversight) could stimulate performance. Once an adjudication reaches the state of a proposed consent agreement or a proposed withdrawal of the complaint, direct public representation could be important. The agency might be willing to enter into a consent agreement or a withdrawal because of interests such as a desire to save its resources. At that stage, a public presence could constrain the agency from excusing the offender.⁷¹

⁶⁵ See, e.g., Consumer Product Safety Act Section 2(b), 15 U.S.C. 2051.

⁶⁶ Note, *supra* note 2, at 1026.

⁶⁷ Federal Trade Commission Act Section 5(b), 15 U.S.C. 45; Securities Exchange Act of 1934 Section 21, 15 U.S.C. 77t.

⁶⁸ The Federal Trade Commission Act Section 5(b) requires a determination "that a proceeding by it in respect thereof would be to the interest of the public . . ." The Securities Act gives the Commission authority to act "in its discretion."

⁶⁹ The Trade Commission uses Trade Regulation Rules to define "unfair or deceptive acts or practices" for future administrative activities. For further discussion, see Chapter 3 of this Report, the Federal Trade Commission.

⁷⁰ See Gellhorn, *supra* note 2, at 380-82.

⁷¹ The Federal Trade Commission places a proposed consent order on the public record for 60 days and receives comments before deciding whether or not to accept the order. FTC Rules of Procedure, Section 2.34, Section 3.25(d), 16 CFR Parts 2 and 3.

In the rulemaking activities of both these agencies, the need for public participation is similar to that of the other agencies which use rulemaking. The Federal Trade Commission, in fact, has been given explicit authority to fund outside groups for their participation in rulemaking.⁷² Its experience has shown such funding to be effective and desirable.⁷³

V. Evaluating the Current Proposals for Increased Public Participation

A. THE AGENCY FOR CONSUMER PROTECTION

Proposals to create an independent agency to represent consumer interests before the agencies have been considered for several years by the Congress, as noted above.⁷⁴ The Agency for Consumer Protection (ACP) would be particularly effective in agencies where the consumers' interest in health or safety is balanced with economic interests, such as the CPSC, FDA, EPA, or NHTSA. In these agencies, the importance of shaping and presenting forcefully the consumers' interest is evident. It should be recognized that even for those agencies the ACP is not a complete solution to the lack of public participation. It represents a beginning, not an end, for several reasons.

First, the ACP will always have to choose between competing uses for its resources. It is unlikely that it will be able fully to represent all important consumer interests.⁷⁵ Second, the consumer interest in a particular proceeding may not be unanimous. The ACP will have to choose among several different interests or represent none. Third, there may be an important public interest which cannot be represented by the ACP because it is not a consumer interest. The Agency for Consumer Protection should therefore be seen as a supplement to direct funding of public groups rather than as a replacement for such funding. Ideally, the ACP should represent a consumer interest only when it appears that no outside group will be able to represent consumers effectively.

The ACP cannot substitute for an effective Public Counsel's Office in ratemaking agencies. Although the ACP could share in some of those proceedings, its limited resources would not permit it to develop the continuous interaction necessary in these specialized, complex proceedings, especially in most ratemaking cases. The ACP could assist a Public Counsel's Office. Their functions are not mutually exclusive, but they function best in different settings.

B. OFFICES OF PUBLIC COUNSEL

As an Office of Public Counsel has continuous contact with the decisionmaking process in its agency, it can be expected to obtain significant expertise. Such experience is especially critical in a ratemaking and entry agency because any individual decision reflects the agency's entire history.

⁷² Magnuson-Moss Warranty-FTC Improvement Act Section 202(h), 15 U.S.C. 58.

⁷³ See Chapter 3, Section III(H) of this Report.

⁷⁴ Note 47, *supra*.

⁷⁵ Note, *supra* note 2, at 1820; *Report on S. 2715, supra* note 6, at 37.

The experience of the ICC with the Rail Services Planning Office demonstrates that such an office can have a beneficial effect by insuring that citizen views are considered.⁷⁶ The recent decision of the Congress to create a statutory Rail Public Counsel's Office at the ICC⁷⁷ demonstrates the confidence in this procedure. The establishment of this Office with a Presidentially-appointed Director with a fixed term also emphasizes the view that, to be truly effective, such an Office must be independent of its agency. (See Chapter 9.)

At least one comentator has suggested that such an Office will be ineffective because it is "likely to remain remote from the variety of actual groups whose interests they would be responsible for representing. . . ." ⁷⁸ The experience at the ICC demonstrates that this is not necessarily so. Moreover, an explicit mandate to consult with affected groups and citizens could insure that a Public Counsel's Office does not become isolated from its constituents.

Such an Office of the Public Counsel would be extremely effective at the FPC, FCC, and ICC (the present Rail Public Counsel only handles railroad matters). The Public Counsel should be authorized to do the following: (a) intervene as a matter of right in any agency proceeding; (b) petition the Commission to begin any rulemaking proceeding; (c) contract with outside groups for their participation in any agency decision; and (d) assist any outside group in preparing its participation.

C. DIRECT AGENCY FUNDING

Direct agency funding of public groups to reimburse them for their expenses could help to assure that such participation will occur. Such funding could be accomplished either by funding in advance or by funding at the conclusion of the proceeding.

Advance funding requires an agency determination that the participation is likely to be important. For example, the Federal Trade Commission, which is the only agency which has explicit authority to do such funding, must find that the citizen or group "has or represents, an interest (i) which would not otherwise be adequately represented in such proceedings and (ii) representation of which is necessary for a fair determination" ⁷⁹ The FTC's authority also requires a determination that, without compensation, the group would be unable to participate. While this requirement may assure that the compensation is not used for groups who would participate anyway, it also raises several questions. Suppose that a group may actually have enough funds to intervene in a particular proceeding. If such an action forecloses it from any other activities, the requirement may have the effect of limiting rather than expanding consumer activity. If the intention is merely to insure that more public participation takes place, a poverty plea may not be necessary.

Though advance funding offers the advantage of assuring the group that expenses will be reimbursed, it will be difficult to determine in advance which of several candidates will make the best contributions.

⁷⁶ See Chapter 9 of this Report, the Interstate Commerce Commission.

⁷⁷ Section 304, Public Law 94-210, enacted Feb. 5, 1976.

⁷⁸ Note, *supra* note 2 at 1826.

⁷⁹ Magnuson-Moss Warranty-FTC Improvement Act Section 202(h)(1), 15 U.S.C. 58.

Moreover, the requirement that the group specify in advance its exact proposals on arguments may unduly constrain its contribution.

Retrospective funding allows an agency to determine that the contribution to the proceeding deserves compensation.⁸⁰ The uncertainty of such a procedure puts the consumer at risk. Further, there is the danger that the public group may moderate its representation because it fears an adverse determination on funding. One possible compromise would be to authorize retrospective funding but to allow for advances when necessary and when it is shown that the participation is likely to be beneficial.⁸¹

Direct agency funding is most likely to be beneficial where the rule-making procedure is a relatively short one and where the issues are relatively narrow or confined. It would assist groups able to develop sufficient expertise in the subject to represent an interest effectively. The mechanism of direct funding has been shown to be effective at the FTC. Its extension to agencies such as the CPSC, EPA, and NHTSA would be constructive. These agencies have implicit authority to employ such funding,⁸² but, with their priorities, it appears unlikely that such funding will occur without a specific appropriation, as at the FTC.

D. FEE SHIFTING OF COSTS

Shifting the costs of public participation by assessing them to the regulated industry would remove the cost barrier to public participation.⁸³ It also would spare the agencies from choosing among competing public groups. Absent explicit Congressional authorization, the use of this method was severely limited by a 1975 Supreme Court decision, *Alyeska Pipeline Service Co. v. Wilderness Society*.⁸⁴ The system has several shortcomings.

It is not clear that there will be satisfactory standards for imposing fee shifting. The agency may be obliged to evaluate each action of the public group to determine whether fee shifting is fair and necessary. Although this evaluation is required also in retrospective direct funding, the agency may be more reluctant to shift costs to the industry than to the taxpayer who is the presumptive beneficiary. Where there are competing economic interests, the allocation of fee shifting among them will be extremely difficult.

Fee shifting also will leave the public group uncertain about reimbursement. Since fee shifting could not easily be subject to advance funding (as with direct funding), the uncertainty would be prolonged. Fee shifting is unlikely to become a useful mechanism for increasing public participation for most agencies.

E. INCREASING INFORMATION AND REDUCING BARRIERS

There are many other steps which the nine agencies could take to increase participation by public interests. The agencies could ag-

⁸⁰ This is the approach of S. 2715.

⁸¹ See letter to Hon. John E. Moss, Chairman, Subcommittee on Oversight and Investigations from Elmer B. Staats, Comptroller-General of the United States, May 10, 1976, reprinted as appendix D-2 to this report.

⁸² 421 U.S. 240 (1975).

⁸³ See Lazarus & Onek, *supra* note 1, at 1100-3.

⁸⁴ Cf. Note, *supra* note 2 at 1025.

gressively seek out interest groups to inform them of their proceedings. The preparation of a handbook for citizens groups who wish to be represented would be helpful as would the creation of an office to assist potential intervenors (with professional help). The reduction or elimination of filing fees, transcript charges, and other costs for public groups would further encourage their participation.

VI. Recommendations

1. The proposed Agency for Consumer Advocacy, passed by both the houses, should be enacted into law.

2. The Congress should establish by statute an independent Office of Public Counsel in the Federal Power Commission, Federal Communications Commission, and the Interstate Commerce Commission, with its Director appointed by the President with the advice and consent of the Senate.

3. The Congress should enact an explicit direct funding mechanism (similar to the Federal Trade Commission authority) for the Consumer Product Safety Commission, Food and Drug Administration, National Highway Traffic Safety Administration, Environmental Protection Agency, and Securities and Exchange Commission.

4. All nine agencies should substantially increase the flow of information to public groups and should study and reduce or eliminate all costs and other barriers to participation.

VII. Conclusion

It is a basic tenet of American democracy that citizens should participate in decisions which affect their lives. This has not happened to a great degree in the Federal regulatory agencies because of an imbalance of political and economic power between regulated industries and the individual American. Though many of the formal barriers to public participation have fallen, there is clearly a need for positive action to encourage representation for the diverse but vital interests of many persons in Federal regulatory decisions. Otherwise, the legitimacy of the regulatory process is placed in doubt. The Subcommittee believes that our recommendations will help to affirm that legitimacy so that Americans will be well served by their government.

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FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 14

OVERLAPPING AND DUPLICATIVE PROGRAMS

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TABLE I		
Summary of the results of the experiments on the effect of the concentration of the solution on the rate of the reaction		
Concentration of the solution	Rate of the reaction	Time taken for the reaction to complete
0.1 M	0.001	100
0.2 M	0.002	50
0.3 M	0.003	33
0.4 M	0.004	25
0.5 M	0.005	20
0.6 M	0.006	16
0.7 M	0.007	14
0.8 M	0.008	12
0.9 M	0.009	11
1.0 M	0.010	10

CHAPTER 14

OVERLAPPING AND DUPLICATIVE PROGRAMS

I. Introduction

One of the most frequently heard criticisms of Federal regulation and perhaps one of the most readily documented is that Federal programs often overlap. It is asserted that agencies and commissions duplicate one another's work. In addition to the waste that such duplication causes within the Federal establishment, it also burdens the private sector of the economy through the imposition of duplicative and sometimes conflicting requirements upon regulated businesses and individuals.

Joint responsibility and requirements for coordination within the Federal Government are objective indicators of the fact that more than one agency has a finger in a particular subject-matter pie. Such provisions also suggest that, because no one agency has the clear cut and sole responsibility to accomplish a particular objective, it is unlikely to be achieved promptly, and perhaps never, in the manner directed by the Congress.

There may be isolated instances where involvement of two agencies in activities pertaining to a single area is warranted; however, this Subcommittee considers that such cases should be very few and that there should be a strong presumption against asking the Federal taxpayer to pay twice to have the same task performed or to have two groups of experts stand ready to each do half of a single, general task.

That duplication and redundancy exist in the programs of the nine agencies studied by the Subcommittee was reported by the agencies themselves. The Subcommittee's questionnaire to each agency in June 1975, described in Chapter 1 of this Report, included the following question:

Are there any areas in which your Commission's [or agency's] authority to regulate or otherwise fulfill its mission actually or potentially overlaps with, or is in actual or potential conflict with, the authority of another department, bureau, agency or commission? List in detail such areas of actual or potential overlap or conflict, including the relevant statutory provisions of all departments, agencies, etc., involved.

All nine agencies responded to this question, reporting various degrees of overlap, duplication, and potential or actual conflict. A compilation of those items reported by the commissions and agencies lists 86 such areas and is printed as Table 1 following this chapter. It should, of course, be recognized immediately that these items differ qualitatively. In some instances two or more agencies have comparable responsibilities with respect to different segments of a business or industry, or with respect to the same problem in different industries;

in others, several units of government look at the same product or industry with different problems in mind or seeking to protect separate groups in the community. In either class of case there is an enormous potential for waste.

The Subcommittee has selected eight cases from the 86 reported by the agencies themselves to discuss in some detail. They illustrate the range of problems generally characterized as representing duplication and overlap. They also indicate the great need which exists for rationalizing the workload within the Federal establishment, for producing a more effective regulatory structure, and for sparing the Treasury and the American taxpayer unnecessary expense.

II. Eight Examples

In order to illustrate concretely the extent to which one agency impinges upon another as they attempt to carry out their separate mandates, and the harm which the duplication can do, the Subcommittee reviewed the following eight cases reported by the agencies. In some cases, additional staff interviews were held with the agencies. The Subcommittee recommendations and conclusions follow.

A. CIVIL LITIGATION

As a general rule, the Department of Justice is the focal point for civil litigation involving the nine agencies considered in this report. Litigation in the name of any of the three agencies within the Executive Branch is usually brought by the Department of Justice. For the six independent regulatory commissions, the situation varies according to the applicable statute.

In general, the Securities and Exchange Commission and Federal Power Commission have full authority to conduct their own civil litigation.¹ The Interstate Commerce Commission and the Federal Communications Commission handle part of their civil litigation, but the Department of Justice conducts certain types of cases on their behalf.² The Federal Trade Commission and Consumer Product Safety Commission both have authority to handle much of their civil litigation in a fall-back capacity; if the Attorney-General declines within a certain period of time to take the case, the Commission may do so itself.³

There are serious disadvantages to this bifurcation of authority between the agency with substantive authority and the Department of

¹ Response to question 91, subcommittee questionnaire of June, 1975 [subcommittee files].

² The ICC defends its own orders in court. 28 U.S.C. 2323, 2348. The Commission enforces Part II of the Interstate Commerce Act (the Motor Carrier Act) itself. 49 U.S.C. 322(b) (1). There is some question about the ICC's ability to enforce Part II of the act. See letter to Hon. Warren G. Magnuson, Chairman, Senate Committee on Commerce, from George M. Stafford, Chairman, Interstate Commerce Commission, May 10, 1976, reprinted in Report of the Senate Committee on Commerce on S. 3308, Serial No. 838, 94th Cong., 2d sess., 54-58 (1976).

³ Under Section 402(a) of the Communications Act, the Department of Justice handles litigation which does not fall under Section 402(b) of that act. Letter to Hon. Warren G. Magnuson, Chairman, Senate Committee on Commerce, from Richard E. Wiley, Chairman, Federal Communications Commission, May 10, 1976, reprinted in Report of the Senate Committee on Commerce on S. 3308, 66-69 (1976).

⁴ Magnuson-Moss Warranty-FTC Improvement Act § 204; Federal Trade Commission Act § 16; Consumer Product Safety Act, as amended by Public Law 94-248 (approved May 11, 1976), § 27(b) (7).

Justice. The Justice attorney to whom the case is assigned is almost invariably less familiar with the details of the commission's statutes, its rules, and the objectives of its overall regulatory program than is the commission's own legal staff. The latter attorneys will have been involved with the case through the administrative process within the commission and are fully conversant with both the factual background and the legal theory of the case. They are aware of the legislative history underlying all the latest amendments to their statutes and the problems which have been encountered in similar or related cases. The Department of Justice attorneys generally do not have anything approaching that degree of background. Even when they work with only a limited number of statutes and therefore develop familiarity with the statutory law in the area, they have not lived with the case for the months or years that it has been developing and progressing through the commission. Further, because of the heavy caseload which many Justice attorneys carry, they usually cannot devote to the case the concentrated and singleminded efforts which the commission attorneys can.

This loss in the quality of representation and effective advocacy of the regulatory commission's position was noted by the Federal Communications Commission recently (in commenting on S. 3308):

"... the effect of 402(a) [of the Communications Act of 1934] in a substantial number of cases has been to involve the Department of Justice in litigation before the U.S. Courts of Appeals concerning specialized matters of particular agency concern in which the Department has little interest or knowledge and no particular expertise. On some occasions, this has resulted in separate court filings by the Department in which positions adverse to the agency's decision has been taken. The proposed language would lessen Commission dependence upon the Department of Justice and the various United States Attorneys in suits to collect monetary forfeitures proposed under the Communications Act or to compel compliance with the Act or Commission rules.

"Moreover, under present law civil actions must be prosecuted by U.S. Attorneys, who are struggling under a staggering caseload in both the criminal and civil dockets. This provision could relieve the U.S. Attorneys from some of this burden, while allowing the Commission to increase the effectiveness of its enforcement program through swift action in the U.S. District Courts."⁴

The second consequence of this split responsibility is the waste of resources. The agency attorneys must first present the case to the Department of Justice, explaining both the issues and their importance to their agency in sufficient detail to persuade the Department to proceed with the case. Then, if the Department agrees to handle it, commission attorneys must brief the Justice Department attorneys assigned to the litigation; this can involve substantial time. In response to the Subcommittee's questionnaire of June 1975, for example, the Federal Communications Commission asserted that "much time is lost and considerable effort is often expended"⁵ to convince the Justice Department to file suits. The Consumer Product Safety Commission, which at that time had no independent litigation authority, reported that such duplication cost the Commission \$200,000 per year.⁶ A further indication of the dollar costs of this duplication is the Security and Exchange Commission's response that its coordination with the Jus-

⁴ Letter from Richard E. Wiley in Report, *supra* note 2, at 69.

⁵ Response to question 95, subcommittee questionnaire of June, 1975 [subcommittee files].

⁶ *Id.*

tice Department in criminal cases cost at least \$1,600,000 from 1971-75 and may have cost twice that amount.⁷

It should be noted that the duplication or waste of personnel in the civil litigation situation has two dimensions. First, those commissions which rely upon the Department of Justice must use staff resources in passing to Justice knowledge of the case so that the Justice Department staff can proceed. Second, in a commission which has authority to conduct its own litigation following a declination by the Department of Justice, the commission must have adequate capability, to be in a position to move forward itself with the case. The waste inherent in this process is obvious.

Finally, in addition to the loss of the most effective representation, and the waste involved in duplicative use of staff, there is an anomaly inherent in the present arrangement. It is inconsistent to create a regulatory commission with structural independence from the Executive Branch and then to make it dependent upon the willingness of another agency of that Branch to pursue and vindicate its independent regulatory judgments and policies in the courts.

B. ENERGY REGULATORY FUNCTIONS AND DATA COLLECTION

Authority with respect to energy matters in the United States Government is severely fragmented. No single agency or commission has the authority or the responsibility both to formulate a comprehensive energy policy and regulate to achieve efficient and productive use of the Nation's energy resources. However, authority to require the submission of energy related data is abundant and is dispersed widely both within and beyond the bounds of the Executive Branch.

For example, the Federal Power Act⁸ and the Natural Gas Act⁹ authorize the Federal Power Commission to collect, publish, and disseminate information with respect to the electric and natural gas industries although, as pointed out in Chapter 10, the FPC can only require the submission of information about natural gas from companies it is authorized to regulate.

The Federal Energy Administration Act,¹⁰ the Energy Supply and Environmental Coordination Act,¹¹ and the Energy Policy and Conservation Act¹² provide the Federal Energy Administration with broad authority to gather information pertaining to all sources of energy.

The situation with respect to the collection of energy related data illustrates two of the most serious problems arising from duplicative and redundant programs: (1) more than one agency performs the same function thus causing sheer waste, while (2) no one agency has sufficiently complete authority to do the entire task alone, thus allowing creating a situation of mutual dependence between the agencies.

As an example of the first consequence, consider the following: the Federal Energy Administration, the Federal Power Commission and the Department of the Interior all collect natural gas reserve in-

⁷ *Id.*

⁸ 16 U.S.C. §24 et seq.

⁹ 15 U.S.C. 717 et seq.

¹⁰ 15 U.S.C. 761 et seq.

¹¹ 15 U.S.C. 79 et seq.

¹² Public Law 94-163.

formation. The Federal Energy Administration's Oil and Gas Reserves Study, completed in 1975, cost \$3 million.¹³ The Federal Power Commission has prepared a National Gas Reserves Study, released in 1973, at a cost of approximately \$630,000 and 37,279 man hours.¹⁴ Further, both these agencies have collected data and prepared extensive studies on the economic impact of the deregulation of the well-head price of natural gas.¹⁵

There is more, however. The United States Geological Survey in the Department of the Interior prepares natural gas reserve studies at an annual cost of about \$650,000 and 23 man years.¹⁶ In addition, the Bureau of Mines assembles data relating to reserves of minerals, mineral fuels, surface stocks, inventories, and production and consumption of petroleum natural gas and coal.

The fragmentation of jurisdiction over natural gas information between the Federal Power Commission and the Federal Energy Administration is also a source of delay and conflict. In July 1975, both the Federal Energy Administration and the Federal Power Commission surveyed companies that deliver natural gas. Both agencies used the resulting data to estimate the extent of alleged natural gas shortages.¹⁷ However, the Federal Power Commission staff believed that, since it could only require information from companies which engage in the sale of gas for resale in interstate commerce, the information obtained by the Federal Energy Administration regarding companies not subject to the jurisdiction of the Federal Power Commission was essential to its consideration of the extent of the natural gas shortage.¹⁸ Despite the importance of the Federal Energy Administration's data to the Federal Power Commission's responsibilities, the Federal Energy Administration repeatedly refused to supply this information to the Federal Power Commission without first obtaining a promise by the Federal Commission to keep it confi-

¹³ Testimony of Dr. Oscar Strongin at hearings on Final Report On Oil and Gas Resources Reserves and Productive Capacities Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d sess., Aug. 6, 1976, at Tr. 45.

¹⁴ Federal Power Commission, memorandum of Aug. 26, 1976, from Gordon Zareski, Planning and Development Division, Chief of the Bureau of Natural Gas to William D. Braun, Counsel, Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce.

¹⁵ Federal Power Commission, Interagency Task Force, January 1975 report entitled "A Preliminary Evaluation of the Cost of Natural Gas Deregulation." Federal Energy Administration, Office of Oil and Gas Analysis, Technical Reports 76-2 and 76-3, Analysis of Natural Gas Deregulation.

¹⁶ Staff telephone conversation with Price McDonald, Petroleum Engineer Conservation Division, United States Geological Survey, Department of the Interior, August 1976. These studies appear to be the most accurate and complete available, probably because the United States Geological Survey has access to the most comprehensive data.

¹⁷ See e.g., Federal Power Commission, "National Gas Survey," vol. I (1975); Federal Power Commission, Bureau of Natural Gas Staff Report on "Requirements and Curtailments of Interstate Pipeline Companies Based On Form 16 Reports Required To Be Filed on April 30, 1976," June 1976; Federal Power Commission, Bureau of Natural Gas staff report on "Firm Deliveries, Firm Curtailments and Firm Requirements of Interstate Pipeline Companies Based on Form 16 Schedule 1A Reports, Summary By State of Actual Firm Deliveries, Firm Curtailments and Firm Requirements for 1975-1976 Winter Compared to Projected For 1976-1977 Winter," August 1976; Federal Energy Administration, "The Natural Gas Shortage: A Preliminary Report," August 1975; Federal Energy Administration Natural Gas Task Force, "Natural Gas Curtailments 1975-1976 Heating Season," October 1975; Federal Energy Administration, National Energy Information Center, "Energy Information Report to Congress, Quarterly Report: Third Quarter 1975" at 27-46; Federal Energy Administration, National Energy Information Center, "Monthly Energy Review," January 1976, at 2-13.

¹⁸ Letter from FPC Assistant General Counsel George P. Lewnos to Albert H. Linden, Jr., Director, Office of Data Services, FEA, Oct. 20, 1975, at 1 [subcommittee files].

dential.¹⁹ The Federal Energy Administration's intrasigence regarding this matter deprived the Federal Power Commission of information it required to carry out its responsibilities.

The current Administration has stated that "when FEA was formed, duplication [of energy information] was rampant."²⁰ Rather than consolidate energy data gathering in one agency, however, the Administration believes that "under legislative authorities already granted, the Federal government has a comprehensive program underway to gather energy information efficiently."²¹ Federal Energy Administrator Zarb recommends "building and improving upon the present energy information program."²² While the Administration agrees with the objectives of improving the collection, verification, coordination, standardization, and dissemination of energy information, it believes "there is already a considerable effort to achieve coordination in developing energy information which I believe is working and will continue to improve in the future."²³ There is no indication, however, that the duplication of energy information gathering has been significantly reduced by the Administration.

The Congress recently enacted legislation to help reduce duplicative activities directed toward gathering energy information. The Energy Conservation and Production Act²⁴ which was signed into law on August 14, 1976, establishes an Office of Energy Information and Analysis within the Federal Energy Administration.²⁵ This office is directed to "review the energy information gathering activities of Federal agencies with a view toward avoiding duplication of effort and minimizing the compliance burden on business enterprises and other persons."²⁶ In addition, the Congress directed that the Federal Energy Administrator prepare a report which "shall include recommendations with respect to the coordination of energy information activities of the Federal Government."²⁷ While no deadline is prescribed in the statute for the completion of that report, it is required to be available for use by the Energy Resources Council before December 31, 1976.²⁸

This provision of the Energy Conservation and Production Act could help to reduce the duplication, cost, and burdens associated with the numerous Federal departments, agencies, commissions, bureaus and other offices collecting energy information.

In addition to proposals to avoid duplication, the report of the Office of Energy Information and Analysis should consider and make necessary recommendations to reduce the fragmentation which currently exists in energy gathering activities and which appears in the past to have frustrated efforts to obtain unified and complete reports.

¹⁹ Memorandum from Joseph J. Solters, Case Manager, Bureau of Natural Gas, FPC, to George P. Lewnes, Assistant General Counsel, FPC, Oct. 24, 1975, at 1 [subcommittee files].

²⁰ Testimony of Eric Zausner, Deputy Administrator, Federal Energy Administration, before the Subcommittee on Integrated Oil Operations of the Senate Committee on Interior and Insular Affairs on S. 1864, the Energy Information Act, Mar. 8, 1976, at Tr. 20.

²¹ Testimony of Frank Zarb, Administrator, Federal Energy Administration, *supra* note 20, at Tr. 16.

²² *Id.*

²³ *Id.* at Tr. 10.

²⁴ Public Law 94-385.

²⁵ Part C of Title I, establishing the Office of Energy Information and Analysis becomes effective 150 days after enactment of Public Law 94-385 (i.e. Jan. 11, 1977).

²⁶ Section 56(a) of the Federal Energy Administration Act of 1974, as added by section 142 of the Energy Conservation and Production Act, Public Law 94-385.

²⁷ Section 56(c) of the Federal Energy Administration Act of 1974, *supra* note 26.

²⁸ Section 108(c) of the Energy Reorganization Act of 1974, as added by section 162(b) of the Energy Conservation and Production Act, Public Law 94-385.

However, further measures such as the consolidation of regulatory activities, as proposed in Chapter 10 (Federal Power Commission), will still be needed to minimize the waste of resources, both public and private, in the energy field.

C. SAFETY STANDARDS FOR TELEVISION SETS AND OTHER PRODUCTS

Two agencies are engaged in setting safety standards for television sets. The Consumer Product Safety Commission and the Bureau of Radiological Health of the Food and Drug Administration both have professional and technical staff engaged in developing standards for the very same product. Food and Drug Administration employees focus on hazards posed by radiation and spent an estimated 28 man years on the television radiation problem in the last fiscal year.²⁹ The CPSC, which is overseeing the development of standards for all other television hazards including fire, electrical shock, implosion, and mechanical defects plans to spend 39 man years on this effort between April 1976 and November 1977.³⁰ FDA has 350 people in its Bureau of Radiological Health who work on a wide range of safety problems involving radiation. Therefore, the two agencies have similar expertise in regulating both radiological and other safety hazards of certain products. It seems inevitable that the maintenance of parallel staff experts by two agencies means that their time is not used as efficiently as possible, they are duplicating portions of each others' work and there is the continuing potential for the issuance of standards which contradict or impede each other.

D. AEROSOL PRODUCTS

Products in which an aerosol propellant is used are potentially subject to the jurisdiction of the FDA, EPA, and CPSC. The FDA regulates aerosol products used for propelling food, drugs, or cosmetics³¹ while EPA regulates those used with pesticides³² and CPSC generally regulates propellants used in all other consumer products.³³ This fragmented jurisdiction causes problems in regulating the safety of both mechanical and environmental hazards which may be caused by aerosols.³⁴ No single Federal agency can consider the full range of problems associated with aerosol products.³⁵ The CPSC is prohibited from regulating products which come under FDA jurisdiction³⁶ or under EPA jurisdiction,³⁷ although this prohibition does not extend specifically to the packaging or propellants of these products. Though

²⁹ Food and Drug Administration, Task Plans, Bureau of Radiological Health, Fiscal Year 1976, Tasks Nos. 303 and 410; Work Plan, Executive Director for Regional Operations, Fiscal Year 1976, Compliance Program 733.08.

³⁰ Consumer Product Safety Commission, Bureau of Engineering Sciences Document No. 520416, The Television Receiver Project Development Plan, Revision 1 (May 12, 1976). Some additional work will be performed by the CPSC laboratory, but this cannot now be estimated.

³¹ 21 U.S.C. 301 et seq.

³² Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135 et seq.

³³ Consumer Product Safety Act, 15 U.S.C. 2051 et seq. and Federal Hazardous Substances Act, 15 U.S.C. 1261 et seq.

³⁴ See generally Consumer Product Safety Commission, decision on Petitions No. CP-74-5 and HP-75-3 (July 1975).

³⁵ See response of CPSC to question 62, subcommittee questionnaire of June 1976 [subcommittee files].

³⁶ 15 U.S.C. 2052(a)(1)(H), (I).

³⁷ 15 U.S.C. 2052(a)(1)(D).

there is statutory support and legislative history indicating that CPSC could exercise a broader jurisdiction than it presently does, the Commission has declined to do so.³⁸

A recent report issued by the National Academy of Sciences³⁹ indicates that the continued use of aerosol propellants containing fluorocarbons poses a serious danger to the earth's ozone layer and hence to the environment generally. The fact that jurisdiction over products containing aerosols is fragmented has precluded a unified consideration of these environmental problems.

The effects of these propellants are potentially grave. The National Academy of Sciences Report points out that "The accumulation of CFM's [fluorocarbons] in the atmosphere, at all levels, increases the absorption and emission of infrared radiation."⁴⁰ The report finds that

"The major effects of DUV [biologically active ultraviolet] increase due to ozone reduction could involve

- Increased incidence of malignant melanoma, a serious form of skin cancer frequently causing death, and thus an increase in mortality from this cause;
- Increased incidence of basal- and squamous-cell carcinomas, less serious but much more prevalent forms of skin cancer, rarely causing death but causing much expense and, occasionally, more or less serious disfigurement;
- Effects on plants and animals of unknown magnitude."⁴¹

Thus, this broadly dispersed jurisdiction causes duplicative use of Federal resources, while at the same time virtually guaranteeing a prolongation of the time necessary to obtain appropriate regulation.

E. NOISE REGULATION

The Environmental Protection Agency has authority to promulgate noise regulations for various products and situations under the Noise Control Act of 1972.⁴² That Act however, is applicable to certain of the same situations as are within the authority of the Consumer Product Safety Commission and the Departments of Transportation, Labor, and Housing and Urban Development.

1. *EPA and Department of Transportation (Federal Aviation Administration)*

The Noise Control Act provides for a complicated relationship between the Environmental Protection Agency and the Federal Aviation Administration with regard to aviation noise control requirements.⁴³ The Environmental Protection Agency submits proposed regulations to the Federal Aviation Administration and the Federal Aviation Administration, after publishing the proposed regulations in the Federal Register and holding public hearing, must either accept the proposals, reject them, or modify them. There is no specific time limit set for the conclusion of the Federal Aviation Administration action. Further, there have been a number of instances in which the Federal Aviation Administration considered proposing regulations on its own initiative

³⁸ See dissenting opinion of CPSC Commissioners Simpson and Kushner in Petition HP-75-3 (July 1975).

³⁹ National Academy of Sciences, Committee on Impacts of Stratospheric Change, Assembly of Mathematical and Physical Sciences, "Halocarbons: Environmental Effects of Chlorofluoromethane Release" (preliminary copy, Sept. 13, 1976).

⁴⁰ *Id.* at 1-3.

⁴¹ *Id.* at 1-5-6.

⁴² Public Law 92-574, 86 Stat. 1234, approved Oct. 27, 1972.

⁴³ *Id.* at § 7.

similar to those proposed to it by the Environmental Protection Agency. To the extent that the proposals were inconsistent, there was confusion and disagreement caused by this two-agency procedure.⁴⁴ The Act does not specify how conflicts are to be resolved where the Federal Aviation Administration rejects or modifies an Environmental Protection Agency proposal and states its reasons upon the Environmental Protection Agency's request, but the Environmental Protection Agency continues to believe that the result of Federal Aviation Administration's action is inadequate regulation.⁴⁵ Therefore, a difference of opinion between the two agencies may result in a stalemate and inadequate regulation of aircraft noise.

2. *Environmental Protection Agency and Department of Transportation (Federal Highway Administration and Federal Railroad Administration)*

While the Environmental Protection Agency issues regulations for control of noise from interstate rail and motor carriers, those regulations must be enforced by the Department of Transportation's Federal Railroad Administration or the Federal Highway Administration, respectively. However, the Department of Transportation's methods and procedures for enforcing these regulations are not always consistent with EPA's intent, and this discrepancy has created problems. For example, complaints are received from the public concerning the noise level from trucks passing a specific location. However, when the Department of Transportation investigates the complaint, it measures the noise level at the nearest trucking weigh station, rather than at the location from which the noise is reported. Some state and local authorities have objected to this procedure and have sought exemptions from EPA regulations⁴⁶ in order to undertake their own, presumably more rigorous, enforcement efforts.

Where the Department of Transportation's enforcement procedures do not carry out the intent or purpose of the Environmental Protection Agency regulations, there is clear frustration of Congressional intent and waste in the total Federal process. Further, states and localities are having to mount their own duplicative efforts to achieve the same purpose, noise control, which underlies the Environmental Protection Agency's regulatory efforts. Here the failure at the Federal level because of fragmented responsibility imposes burdens upon other levels of government.

The Environmental Protection Agency expends 96 man years and a \$10,283,000 budget to implement the Noise Control Act.⁴⁷ The Department of Transportation estimates that for fiscal year 1976, approximately 98 man years and \$4.420 million were expended on noise abatement activities.⁴⁸

⁴⁴ Staff telephone conversation with Charles Elkins, Deputy Assistant Administrator (Noise), EPA (September 1976).

⁴⁵ 42 U.S.C. 1857.

⁴⁶ See Noise Control Act of 1972, *supra* note 42 at §§ 17(c)(2), 18(c)(2).

⁴⁷ House Appropriations Committee hearings on 1977 appropriations for HUD and Independent Agencies, Part IV.

⁴⁸ Letter from John Wesler, DOT Office of Noise Abatement to subcommittee staff, Sept. 1, 1976. Mr. Wesler emphasized that these figures are estimates only, since many staff members deal with broad environmental matters, not just noise, so that the values listed are subjective estimate only. Also, the funding levels do not include salaries. Figures are for fiscal year 1976.

3. *Environmental Protection Agency and Department of Labor (Occupational Safety and Health Administration)*

The Occupational Safety and Health Administration regulates noise limits in the work place in terms of dose standards (the amount of noise a worker encounters), while the Environmental Protection Agency regulates environmental noise in terms of the impact on the public health and welfare. The Environmental Protection Agency issues regulations concerning noise source emission from machines,⁴⁹ some of which are used in work place situations. Thus the Environmental Protection Agency's regulations for emission of noise from individual machines might be more stringent than the rules of the Occupational Safety and Health Administration, prescribing the allowed level of exposure for the machine operator. Presumably the stricter rule would prevail, but the potential for duplicative Federal efforts continues to exist, with the attendant waste. Further, public confusion is bound to result whenever two Federal agencies issue differing noise limits applicable to the same situation. The fact that two agencies are regulating the same noise against two different standards is almost sure to be missed.

The Environmental Protection Agency is also directed to coordinate the noise research and noise control programs of all the other Federal agencies which have a responsibility for a segment of this problem. All Federal agencies must consult with EPA when prescribing regulations and it in turn, through a publicly made request for a report and subsequent comment on that report, must advise the agency when its proposed rules are inadequate to protect public health and welfare. However, this process can lead to disagreement between the agencies involved. A conspicuous example of this is the more than year long controversy regarding the Occupational Safety and Health Administration's proposed 90 A-weighted decibel 8-hour noise exposure limit for occupational situations, which the Environmental Protection Agency considers to be inadequate to protect health and welfare.⁵⁰

F. PUBLIC UTILITY HOLDING COMPANIES

Interstate holding companies which are engaged through their subsidiaries in the electric utility business or in the retail distribution of natural or manufactured gas are subject to regulation by the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935.⁵¹ Under this Act, the Securities and Exchange Commission regulates the issuance and sale of securities by holding companies and their subsidiaries. The Commission spent \$580,000 and 22.6 man-years on regulation under the Public Utility Holding Company Act for fiscal year 1976.⁵²

Under the Federal Power Act,⁵³ the Federal Power Commission has jurisdiction over the issuance of securities by public utilities which

⁴⁹ Noise Control Act of 1972, *supra* note 42 at § 6.

⁵⁰ The Occupational Safety and Health Act of 1970 § 6(b), 29 U.S.C. 655(b), grants OSHA authority to set standards for workplace health and safety. OSHA Docket # OSH 11 relates to noise exposure.

⁵¹ 15 U.S.C. 79(a) et seq.

⁵² Staff telephone conversation with Andrew J. Rothman, Director of Public Affairs, Securities and Exchange Commission, August 1976.

⁵³ 16 U.S.C. 824 et seq.

are not subject to the jurisdiction of the Securities and Exchange Commission under the Public Utility Holding Company Act and are not organized and operating in a state in which security issuances are regulated by a state utilities commission. The Federal Power Commission spent \$21,000 and 1½ man-year on the regulation of issuance of securities by public utilities under its jurisdiction.⁵⁴

While the Securities and Exchange Commission and the Federal Power Commission do not regulate the same companies, the identity of function between the two agencies results in the wasteful maintenance of two separate staffs, possessing a common expertise.

G. REGULATION OF LIQUEFIED NATURAL GAS

An overlap of authority exists with respect to the safety aspects of liquefied natural gas (LNG) facilities and transportation regulation. Under the Natural Gas Pipeline Safety Act of 1975,⁵⁵ the Office of Pipeline Safety of the Department of Transportation is responsible for prescribing minimum safety standards for all facilities used in the interstate transportation or storage of natural gas, including LNG facilities. That office spends about \$150,000 per year and 1¼ man years on LNG regulation.⁵⁶

Under the Natural Gas Act, the Federal Power Commission regulates the construction of interstate natural gas facilities, including LNG facilities, and the importation of natural gas.⁵⁷ The Commission may attach specific safety conditions to its authorizations to import LNG and to construct LNG facilities.⁵⁸ Safety is also a primary concern of the FPC in its environmental review responsibilities under the National Environmental Policy Act.⁵⁹ The Federal Power Commission has spent about \$180,000 and 3 man-years on LNG regulation.⁶⁰ The Ports and Waterways Safety Act of 1972⁶¹ gives the Coast Guard jurisdiction over safety in the transportation and handling of LNG aboard vessels in U.S. territorial waters, and in land structures on or immediately adjacent to such waters.

The Department of Transportation has recognized this duplication of responsibility and has stated that legislation to correct this overlap "would prevent (LNG) applicants being compelled to comply with two different—and conceivably conflicting—sets of Federal requirements on the same subject matter."⁶² The elimination of this overlap would therefore save money for the taxpayers as well as for the businesses involved.

II. REGULATION OF PESTICIDES

The Environmental Protection Agency has authority to regulate pesticide products under the Federal Insecticide, Fungicide, and

⁵⁴ Staff telephone conversation with John F. King, Comptroller, Federal Power Commission, August 1976.

⁵⁵ 49 U.S.C. 1671 et seq.

⁵⁶ Staff telephone conversation with Lucian Furrow, Chief, Regulations Division, Office of Pipeline Safety Operations, Department of Transportation, August 1976.

⁵⁷ 15 U.S.C. 717 et seq.

⁵⁸ 15 U.S.C. 717b and 717f(e).

⁵⁹ 42 U.S.C. 4321 et seq.

⁶⁰ Staff telephone conversation with John F. King, Comptroller, Federal Power Commission, August 1976.

⁶¹ 33 U.S.C. 1221 et seq.

⁶² Letter from William T. Coleman, Jr., Secretary of Transportation to the Honorable Nelson A. Rockefeller, President of the Senate, July 9, 1975.

Rodenticide Act (FIFRA).⁶³ There are some 33,000 pesticide products on the market, half of which are used in agriculture, and the remainder for household and institutional use.⁶⁴

The Environmental Protection Agency authority to regulate pesticides has resulted in conflicts with the Department of Agriculture. The mission of the Department is to increase food and fiber production and, in performing this function, it encourages the use of pesticides. Accordingly, in order to protect the environment or human health, the Environmental Protection Agency may prohibit the use of a product which Agriculture wishes to encourage in the interests of increased crop production. A well-known example of this conflict occurred when the Environmental Protection Agency cancelled the use of DDT, a product which Agriculture strongly encouraged for use on cotton and other agricultural crops. As a result of the Congressional oversight hearings on FIFRA in 1975, the Environmental Protection Agency is now required to furnish Agriculture with a proposed notice of cancellation and the Department has 60 days in which to comment on the proposed action.⁶⁵ While this does not necessarily eliminate the divergent views of the two agencies, it does enable Agriculture to voice its comments prior to any pesticide cancellation at the price of additional delay. The Environmental Protection Agency expends 954 man-years and a budget of \$46,923,000 in regulating and enforcing the pesticides program.⁶⁶ The Department of Agriculture was unable to furnish any firm estimates of the man years or dollars involved, but they are significant.

III. Conclusions and Recommendations

There are many instances of duplicative, redundant and in some cases conflicting programs among the Federal regulatory agencies. Certain instances of "duplication" are in fact cases where different agencies are considering separate aspects of a problem or product and separate review may, therefore, be useful. For example, the Federal Communications Commission and the Federal Trade Commission both examine television commercials in the course of carrying out their respective mandates. Other situations are examples of waste of resources, both of the government and of the businesses which must comply with different rules. Still others illustrate the failure of the regulatory process to deal comprehensively with a single problem, such as the environmental dangers of aerosol products. Each of these situations must be considered separately. The Subcommittee makes the following recommendations with respect to the eight cases discussed above.

A. CIVIL LITIGATION

The Subcommittee recommends that the six independent regulatory commissions (Interstate Commerce Commission, Federal Power Commission, Federal Trade Commission, Securities and Exchange Commission, Federal Communications Commission, and Consumer Prod-

⁶³ 7 U.S.C. 135 et seq.

⁶⁴ For further discussion of pesticide regulation by EPA, see chapter 4 of this report.

⁶⁵ Public Law 94-351, approved Nov. 28, 1975.

⁶⁶ House Appropriations Committee hearings on 1977 appropriations for HUD and Independent Agencies, Part IV.

uct Safety Commission) be given exclusive and plenary authority to initiate and manage civil litigation arising out of implementation of their respective legislative mandates. Such exclusive jurisdiction would eliminate the need for duplicative legal capabilities, saving both appropriations and positions within the Federal government. It would obviate the work which is presently necessary on the part of commission attorneys who must first explain the case to the Department of Justice and persuade the Department to take it, and then fully brief the Justice staff to whom the case has been assigned. It would also assure that the attorneys with the greatest degree of familiarity with a particular commission's statutes and program will select and manage their own cases.

In the case of the three agencies having regulatory responsibility but located within the Executive Branch (Environmental Protection Agency, National Highway Traffic Safety Administration, and Food and Drug Administration), the Subcommittee believes that additional careful study is necessary on the issue of management of their civil litigation. The Subcommittee recognizes that there may be separate considerations applicable to these three agencies making centralized management of litigation desirable within the Executive Branch. On the other hand, the appropriate committees of the House and Senate should also look closely at these agencies' recent experience in litigating through the Department of Justice.⁶⁷ It may well conclude that when an Executive Branch agency is given public protection regulatory responsibilities, it is preferable or even essential that it also have all authority necessary to carry out its functions.

B. ENERGY REGULATORY FUNCTIONS AND DATA COLLECTION

The Subcommittee recommends the creation of a single, independent agency to regulate certain energy sources. This proposal is discussed in more depth in Chapter 10.

C. SAFETY STANDARDS FOR TELEVISIONS AND OTHER PRODUCTS

D. AEROSOL PRODUCTS

These two examples illustrate the problems which occur when similar health and safety hazards are regulated by several agencies. Expertise and research capability are duplicated with resulting waste. Even more important, the fragmented authority results in less effective regulation because no single agency can consider the full range of issues.

For these reasons, the Subcommittee recommends the creation of a Consumer Safety and Health Commission to assume various functions which would include the areas in the three examples. This proposal is considered in detail in Chapter 17, Recommendations.

E. NOISE REGULATION

F. PUBLIC UTILITY HOLDING COMPANIES

G. REGULATION OF LIQUEFIED NATURAL GAS

H. REGULATION OF PESTICIDES

For these cases, the Subcommittee offers no specific recommendations at this time on eliminating duplication most effectively. The

⁶⁷ See Appendix A-6 for a summary of declinations by the Department of Justice of agency referrals.

Subcommittee believes that these four areas should be considered promptly after the agencies involved have been requested to submit their views to the Congress.

The Subcommittee believes that regulation should be as effective and as inexpensive as possible. The two objectives are often surprisingly compatible. Overlapping and duplicative programs reduce Federal regulatory efficiency, unnecessarily burden the business community, and cost the taxpayer excessively. The public benefits by elimination of regulatory redundancy.

TABLE 1.—ACTUAL AND POTENTIAL OVERLAP OR CONFLICT OF REGULATORY PROGRAMS

Agency	Function	Overlapping or conflicting
		Department, Bureau, Agency, or Commission
CPSC.....	Flammability standards for interior furnishings of automobiles and recreational vehicles.	National Highway Traffic Safety Administration.
	Aerosol products.....	Food and Drug Administration and Environmental Protection Agency.
	Special packaging of pesticides.....	Environmental Protection Agency.
	Risks that could be reduced or eliminated by actions taken under the Occupational Safety and Health Act.	Occupational Safety and Health Administration.
	Regulation of boat equipment as defined in sec. 3(8) of the Federal Boat Safety Act of 1971.	U.S. Coast Guard
FCC.....	Authority to develop standards and regulations for consumer products and EPA's authority to promulgate noise regulations for various products under the Noise Control Act.	Environmental Protection Agency.
	Safety in aviation and at sea.....	Federal Aviation Administration and U.S. Coast Guard.
	Radio monitoring and spectrum management.....	Office of Telecommunications (Department of Commerce).
	False misleading advertising.....	Federal Trade Commission.
	Unfair trade practices.....	Do.
FPC.....	Children's television.....	Do.
	Application of the fairness doctrine to commercial announcements.	Do.
	Liquefied natural gas safety facilities.....	Office of Pipeline Safety (Department of Transportation) and U.S. Coast Guard.
	Energy information and reporting duties.....	Federal Energy Administration, Bureau of Mines, U.S. Geological Survey.
	Unfair methods of competition and unfair or deceptive acts or practices.	Antitrust Division (Department of Justice).
FTC.....	Practices of meat packers.....	Packers and Stockyards Division (Department of Agriculture).
	Disclosure of prescription prices by retail pharmacists.	Food and Drug Administration.
	Regulation of acts and practices of the land development industry.	Department of Housing and Urban Development.
	Activities of persons engaged in promoting pyramid sales plans.	Securities and Exchange Commission.
	Regulating pesticide advertising.....	Environmental Protection Agency.
ICC.....	Dealings with mail frauds.....	Postal Service.
	Eliminating deceptive and confusing tire nomenclature and marketing practices.	National Highway Traffic Safety Administration.
	Filings of tariffs of international intermodal transportation carriers.	Federal Maritime Commission.
	Interstate electric and gas companies subject to regulation.	Federal Power Commission.
	The definition of "commodity".....	Commodity Futures Trading Commission.
SEC.....	Solvency of financial institutions versus disclosure of information.	Comptroller of the Currency and Federal Reserve Board.
	Liquid market for residential mortgages securities.	Federal Home Loan Mortgage Corporation.
	Regulating the securities industry in a manner to best protect the public.	Antitrust Division (Department of Justice).
	Conflicting regulations of small business investment companies.	Small Business Administration.
	Conflicting rules on the types of financial statement disclosures by a taxpayer electing to use last in, first out (LIFO) inventory method of accounting.	Internal Revenue Service.
SEC.....	Corporations organized pursuant to the Alaska Native Claims Settlement Act of 1971.	Department of Interior.
	Impact of the Employee Retirement Income Security Act on the securities industry.	Department of Labor and Internal Revenue Service.

TABLE 1.—ACTUAL AND POTENTIAL OVERLAP OR CONFLICT OF REGULATORY PROGRAMS—Continued

Overlapping or conflicting

Agency	Function	Department, Bureau, Agency, or Commission
EPA	Electric power generating function.	Tennessee Valley Authority.
	Programs established to increase the burning of coal.	Federal Energy Administration.
	Highway building functions.	Department of Transportation.
	Regulate dredging and filling.	Corps of Engineers.
	Regulate radioactive discharges.	Nuclear Regulatory Commission.
	Aircraft (noise and air pollution).	Federal Aviation Administration.
	Regulating truck noise.	Department of Transportation.
	Allocating low-polluting supplies of oil and coal.	Federal Energy Administration.
	Protecting fish and wildlife.	Department of Interior.
	Management of pollution of land and facilities.	All Federal agencies.
	Reentering fields after an application of pesticides (workplace).	Occupational Safety and Health Administration.
	Pesticide packaging.	Consumer Product Safety Commission.
	EPA prescribes and FDA enforces pesticide tolerances.	Food and Drug Administration.
	Solicitation of the Secretary of Agriculture's views before publishing regulations.	Department of Agriculture.
	Transportation of hazardous materials.	Department of Transportation.
	Treasury prescribes regulations in consultation with EPA for importation.	Department of Treasury.
	Use of pesticides.	Department of Agriculture.
	Duplicate regulation of some products.	Food and Drug Administration.
	False and misleading advertising.	Federal Trade Commission.
	Safe water supplies.	Food and Drug Administration.
	Lists of hazardous materials and actions that should be taken when spilled in the environment.	Office of Hazardous Materials (Department of Transportation) and U.S. Coast Guard.
	DOT certifying and funding programs and projects which may conflict with promulgated EPA transportation plans for achieving the oxidant and carbon monoxide standard health.	Department of Transportation.
	Coal users switching to oil and converting plants to coal with violation of environmental standards.	Federal Energy Administration.
	Aviation noise control requirements.	Federal Aviation Administration.
	Control of noise from interstate rail and interstate motor carriers.	Department of Transportation.
	Mortgage insurance for land areas impacted by noise around airports and near transportation systems.	Department of Housing and Urban Development.
	Policies affecting military air.	Department of Defense.
	Protect the public from loud noise pollution.	Consumer Product Safety Commission.
	Emission of noise from machines (sometimes in workplace situation).	Occupational Safety and Health Administration, Department of Labor.
	Control of noise pollution.	All Federal agencies.
	Energy development and conservation as related to waste.	Environmental Research and Development Administration and Federal Energy Administration.
	Application of Federal radiation guidance.	Department of Health, Education, and Welfare.
	Automotive emission control devices.	National Highway Traffic Safety Administration.
	Impact of a proposed highway on air quality and noise standards.	Federal Highway Administration.
	Interstate motor carrier noise standards.	Do.
	Airport noise.	Federal Aviation Administration.
	Locating supplies of low sulphur coal.	Federal Energy Administration.
	Effluent limits for radioactive liquid releases.	Nuclear Regulatory Commission.
	Pesticides and water pollution control.	Department of Agriculture.
	Planning efforts under sec. 208 of the Federal Water Pollution Control Act.	Soil Conservation Service (Department of Agriculture).
	Allocation of fuels and unleaded fuel to areas where unleaded fuel is not sufficiently available.	Federal Energy Administration.
	Enforcement of the Federal Water Pollution Control Act.	Department of Justice.
FDA	Labeling and advertising of foods, drugs, cosmetics, and therapeutic devices.	Federal Trade Commission.
	Control of fish and fishery products.	National Marine Fisheries Service, National Oceanic and Atmospheric Administration (Department of Commerce).
	Labeling of alcoholic beverages.	Bureau of Alcohol, Tobacco, and Firearms (Department of Treasury).
	Aerosolized sprays containing lecithin and pottery.	Consumer Product Safety Commission.
	Control of mycotoxins in grains, control of quality of canned fruits, land vegetables, residues of drugs in meat and poultry, etc.	Department of Agriculture.
	Control of residues of pesticides on foods, regulation of pesticides that are also animal drugs, etc.	Environmental Protection Agency.
NHTSA	Mobile homes.	Department of Housing and Urban Development.
	Off-road vehicles.	Consumer Product Safety Commission.
	Automobile warranties.	Federal Trade Commission.
	Occupational safety and health.	Department of Labor.
	Catalytic converters.	Environmental Protection Agency.
	Motor vehicle equipment.	Consumer Product Safety Commission.

Source: Replies to subcommittee questionnaire of June 1975 (question 62 to commissions and question 47 to single-administrator agencies).



FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 15

USE AND MISUSE OF BENEFIT/COST ANALYSIS

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CHAPTER 15

USE AND MISUSE OF BENEFIT/COST ANALYSIS

I. Introduction

Congress, by the Flood Control Act of 1936,¹ required, as a prerequisite to a decision to initiate Federal flood control efforts, a finding that "benefits to whomsoever they may accrue are in excess of the estimated costs" ² The Flood Control Act contemplated that dollar benefits and dollar costs would be compared in the now-familiar benefit/cost ratio. The Army Corps of Engineers computed the benefit side of the equation by calculating the amount of economic damage caused by the floods in prior years.³ Cost was determined by adding the costs of dike and reservoir construction, reservoir lands, pumping plants, and drainage.⁴ With respect to benefits more difficult to measure, the following approach was taken: ⁵

Some of the property protected particularly in areas to be diked, is at such low elevation as to have little present value for any purpose. The protection of this property will result in an increase in value considerably in excess of the benefits from the elimination of damages or the restoration of past values. There will also be an appreciation in values of surrounding property, as well as general increases in property value in the flooded areas. Since all these benefits are of a speculative nature, they have not been evaluated in this report. Other benefits that have not been evaluated, except indirectly in the restoration of property values, are prevention of loss of life and increase in social security to affected communities.

Since 1936 our collective reluctance to quantify benefits and costs "of a speculative nature" has declined and today, for example, decisions to prohibit hazardous uses of carcinogenic (cancer-causing) pesticides are preceded by efforts to count the number of lives potentially affected by levels of exposure measured in parts per billion.

Benefit/cost analysis has been borrowed from the Army Corps of Engineers and implanted as a prerequisite to many health, safety, and environmental regulatory decisions.

Its usefulness in this new context is the subject of this inquiry.

II. Benefit/Cost Analysis Is Required, Increasingly Often, as a Prerequisite to Decisionmaking

The President, by Executive Order 11821, directed executive branch agencies to evaluate the "inflationary impact" of "[M]ajor proposals

¹ 33 U.S.C. Section 701a-701f, 701h (1970). "It is generally agreed that the genesis of cost-benefit analysis in the federal government is the Flood Control Act of 1936. . . ." G. A. Plescher and G. P. Jones, "Cost-Benefit and Cost-Effectiveness Analysis in Determining Priorities Among Motor Vehicle Safety Standards, Programs and Projects," in "Proceedings of the Fourth International Congress on Automotive Safety," (1975).

² 33 U.S.C. Section 701a (1970).

³ See, e.g., "Report on Connecticut River, Massachusetts, New Hampshire, Vermont, and Connecticut, H.R. Doc. No. 455," 75th Cong., 2d sess., 108 (1937).

⁴ *Id.*

⁵ *Id.* at 20-21.

for legislation, and for the promulgation of regulations or rules"⁶ The Office of Management and Budget, within the Executive Office of the President (OMB), by its Circular No. A-107 implements Executive Order 11821. It requires:⁷

(1) an analysis of the principal cost or other inflationary effects of the actions on markets, consumers, businesses, etc., and, where practical, an analysis of secondary cost and price effects. These analyses should have as much quantitative precision as necessary and should focus on a time period sufficient to determine economic and inflationary impacts.

(2) a comparison of the benefits to be derived from the proposed action with the estimated costs and inflationary impacts. These benefits should be quantified to the extent practical, and

(3) a review of alternatives to the proposed actions that were considered, their probable costs, benefits, risks, and inflationary impacts compared with those of the proposed action.

The Council on Wage and Price Stability, within the Executive Office of the President, also plays a major role in the President's Inflation Impact Statement Program established by Executive Order No. 11821 and OMB Circular No. A-107.⁸ Its Sixth Quarterly Report states:⁹

[t]he Council believes . . . that agencies, proposing cost-increasing actions [must] be particularly careful to assure both themselves and the public that the tangible and intangible benefits of such actions do indeed exceed the costs they will cause others to bear.

Since 1971 OMB has managed a similar procedure for interagency review of "[p]roposed . . . regulations, standards, guidelines, and similar materials pertaining to environmental quality, consumer protection, and occupational health and safety."¹⁰ This procedure, called "quality of life review" by officials in affected agencies, requires selected executive departments or agencies to submit a summary to OMB indicating, among other things, "[a]lternatives to the proposed actions that have been considered; [and] a comparison of the expected benefits or accomplishments and the costs (Federal and non-Federal) associated with the alternatives considered. . . ."¹¹

The Executive Office directives have, in turn, been implemented at the individual agency level. The Secretary of Transportation, on April 13, 1976, promulgated internal Departmental policies requiring, with respect to its proposed regulatory actions, "[a]n estimate of resulting costs to the private sector, to consumers, and to Federal, State, and local government as well as an evaluation of benefits and other impacts, quantified to the extent practicable."¹² The Environmental Protection Agency, by its Order 1000.6, requires computation of the "Economic (cost/benefit aspects)" of its proposed standards and regulations.¹³

⁶ Exec. Order No. 11,821, 3 C.F.R. — (1974).

⁷ Executive Office of the President, Office of Management and Budget, Circular No. A-107 (1975).

⁸ Executive Office of the President, Council on Wage and Price Stability, Sixth Quarterly Report 21 (April 1976).

⁹ *Id.*

¹⁰ Memorandum from OMB Director George P. Shultz to Heads of Departments and Agencies, Oct. 5, 1971.

¹¹ *Id.*

¹² U.S. Department of Transportation, Policies to Improve Analysis and Review of Regulations, 21 Fed. Reg. 16200 (1976).

¹³ U.S. Environmental Protection Agency, Policy and Procedures for the Standards and Regulations Development Process, EPA Order No. 1000.6 (Dec. 10, 1971). EPA Order 1000.6 was superseded by EPA Order 1000.6A, October 14, 1975, which with EPA's "Manual of Procedures for the Development of Regulations," is to the same effect.

On May 5, 1976, a bill was introduced by Senator James B. Pearson which would require "cost and benefit assessment statements"¹⁴ with respect to any agency rulemaking likely to have a "substantial economic impact."¹⁵

III. There Are Problems Involving the Accuracy and Reliability of Measurements

A. GROSS OVERESTIMATION MAY PREJUDICE DECISIONS

A startling example of overestimation occurred in 1973 when the Department of Agriculture asked the Environmental Protection Agency to establish an official tolerance level for residues of hexachlorobenzene (HCB) in the fat of cattle, other animals, and poultry. The Department of Agriculture supplied estimates to the Environmental Protection Agency of the economic loss for various levels of tolerance. Russell W. Peterson, then Chairman of the Council on Environmental Quality, gave this cogent summary:¹⁶

If the level were set at 5-tenths of a part per million, the data indicated, 5,200 cattle worth \$2.6 million would have to be destroyed. In spite of this dire prediction, EPA *did* publish a tolerance level of 5-tenths of a part per million for HCB. Low and behold, instead of the projected \$2.6 million loss, only \$1,500 worth of cattle—a grand total of three head—had to be destroyed.

This incident does not, to my mind, demonstrate chicanery nor even incompetence. It simply proves that fallible human beings, working with sketchy information under a deadline imposed on them by a health hazard, are very likely to come up with fallible results.

But some studies suggest that more than the fallibility of human beings may be at work.

B. ESTIMATES MAY REFLECT THE BIAS OF THEIR SPONSOR

The National Highway Traffic Safety Administration's rulemaking docket as of May 23, 1975, had received five estimates predicting the number of lives that could potentially be saved annually by issuance of a passive restraint standard (assuming manufacturers choose air cushions with lap belts to meet the standard).¹⁷ The estimates ranged from 2,700 net lives saved (lives saved if all cars were equipped with passive restraints less lives saved by safety belts assuming realistic rates of usage) to 19,000.¹⁸ General Motors' estimate was 2,700. Economics and Science Planning, Inc., estimated that 3,000 lives could be saved. Economics and Science Planning, Inc., had been commissioned by the Council on Wage and Price Stability to review and critique the National Highway Traffic Safety Administration's benefit/cost analysis. The Council on Wage and Price Stability selected Economics and

¹⁴ S. 3384, 94th Cong., 2d sess., Section 20, 122 Cong. Rec. 56525, 56529 (May 5, 1976).

¹⁵ *Id.*

¹⁶ Remarks by Russell W. Peterson, Chairman, Council on Environmental Quality, Society of Toxicology Annual Meeting (Mar. 16, 1976). Cattle with residues of HCB above the official tolerance level would be held from the market to avert a human health hazard.

¹⁷ Hearings on Regulatory Reform of the National Highway Traffic Safety Administration before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d sess., Vol. IV, Ser. No. 94-53, at 486 (1976).

¹⁸ *Id.*

Science Planning "[k]nowing of [its] opposition to air bags but in the belief that [it] could make the most credible case for the other side."¹⁹ Ford Motor Company estimated that 3,600 lives would be saved. Approximately in the middle was the National Highway Traffic Safety Administration's estimate of 8,900 lives. Finally, John Z. De Lorean, a former General Motors Vice President and proponent of passive restraint systems,²⁰ under contract with the Allstate Insurance Company, a supporter of passive restraints since 1972, estimated that 19,000 lives could be saved by issuance of the passive restraint standard.

The projections clearly reflect the positions taken by the respective parties regarding passive restraints. Those opposed, General Motors, Economics and Science Planning, and Ford, all estimate that a relatively small number of lives would be saved. De Lorean's estimate reflects his own and the Allstate Insurance Company's support for passive restraints. The National Highway Traffic Safety Administration's estimate falls between the two extremes.

C. INACCURATE ESTIMATES MAY BE UNAVOIDABLE

The Occupational Safety and Health Administration's (OSHA) efforts to regulate occupational noise exposure illustrate the difficulty of accurately projecting costs. The firm of Bolt, Beranek and Newman, Inc., endeavored to measure the cost to manufacturing industries that would result by reducing the noise exposure limit from 90 dBA (decibels) to 85 dBA. The Bolt, Beranek and Newman firm made estimates in 1973²¹ and in 1975.²² In 1973 the firm estimated that industry-wide compliance with an 85 dBA and a 90 dBA regulation would cost \$31.6 billion and \$13.5 billion respectively. In 1975 the same firm changed its estimate. It projected that an 85 dBA would cost \$18.5 billion and a 90 dBA would cost \$10.5 billion. The second cost estimate to meet the 85 dBA is \$13.1 billion less, or about 60% of the original estimate made only two years before. Bolt, Beranek and Newman acknowledged the change in estimated cost and attributed it to a variety of reasons.²³ But the fact remains that the cost estimates were changed considerably, thus revealing an ever present defect in using benefit/cost analysis—inaccurate measurements.

¹⁹ "Subsequent to our January 8 meeting I commissioned Larry Goldmuntz of Economics and Science Policy [Sic] to prepare a written critique of the materials you had given us. I did this knowing of his opposition to air bags but in the belief that he could make the most credible case for the other side." Memorandum from George Eads, Assistant Director, Government Operations and Research, Executive Office of the President, Council on Wage and Price Stability, to Dr. James B. Gregory, Administrator, National Highway Traffic Safety Administration, Feb. 7, 1975.

²⁰ "I am extremely concerned that short-sighted, tunnel vision may prevail in the auto industry's present economic crises. I am fearful that we may turn away and delay installation on all of our passenger cars of the tried and proven passive restraint systems with their vital potential to attenuate injury and spare human lives." Address by John Z. De Lorean (presenting the Occupant Restraint System Expenditure/Benefit Study by the John Z. De Lorean Corp.), National Highway Traffic Safety Administration Public Meeting on Occupant Crash Protection, May 19, 1975.

²¹ Bolt, Beranek & Newman, Inc., "Impact of Noise Control at the Workplace," Report No. 2671, 15, 28 (1973). Technically, dBA refers to decibels as measured on the A scale. The A scale is believed to best correlate with human response.

²² Bolt, Beranek & Newman, Inc., "Economic Impact Analysis of Proposed Noise Control Regulation," Report No. 3246, 3-31 (1976).

²³ "Major reasons for the decrease include: More appropriate extrapolation . . . ; Measurements—rather than estimates—of actual in-plant conditions; and Use of actual industry expenditures on noise control projects over the last 2 years." *Id.*

D. WHEN FACTORS ON EITHER SIDE OF THE EQUATION DEFY MEASUREMENT,
BENEFIT/COST ANALYSIS AS A TECHNIQUE TO AID DECISIONMAKING
BREAKS DOWN

Efforts to calculate the number of lives that could potentially be saved by a particular motor vehicle safety feature, for example, can produce only rough estimates. Estimation involves consideration of such factors as vehicle speed at time of crash, crash mode (side, frontal, rollover, single or multiple impact), severity of deformation (corresponding to object with which impact was made), severity of injuries, deceleration curve, and restraint usage.

The problem of counting lives potentially affected is especially acute when dealing with decisions involving cancer-causing agents. The case study on pesticides in the Environmental Protection Agency Chapter indicated that as many as 25% of all pesticide products in the marketplace are suspect carcinogens.²⁴

Under the Federal Insecticide, Fungicide, and Rodenticide Act, the Administrator of the Environmental Protection Agency may allow the use of a known carcinogen if he concludes that such use would not constitute an "unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of [its] use" ²⁵ On May 25, 1976, the Environmental Protection Agency issued interim procedures and guidelines regarding "Health Risk and Economic Impact Assessments of Suspected Carcinogens." ²⁶ The "Interim Guideline for Carcinogen Risk Assessment" concluded: ²⁷

The summary section of the risk assessment should provide a statement which encompasses answers to the following questions: (1) How likely is the agent to be a human carcinogen? (2) If the agent is a human carcinogen, what is the estimated impact on human health?

Simply stated, the summary is supposed to quantify the number of lives potentially affected by the cancer-causing agent. Yet the task is not as simple as the guideline would suggest.

The first obstacle to measurement involves the complementary concepts of threshold value and dose-response relationship. The United States Court of Appeals for the Eighth Circuit in one of the many decisions it has rendered in the *Reserve Mining* case framed the problem: ²⁸

In order to predict the likelihood and magnitude of disease resulting from exposure, one must have some idea of the relevant threshold value and dose-response relationships.

The Court elaborated in a footnote: ²⁹

A threshold value is that level of exposure below which no adverse health effects occur, while the dose-response relationship quantifies the association between disease-producing levels of exposure and the incidence of disease.

²⁴ See Chapter 4 note 225 and accompanying text.

²⁵ Compare 7 U.S.C. Section 136a(c)(5) with 7 U.S.C. Section 136(bb).

²⁶ 41 Fed. Reg. 21402 (1976).

²⁷ 41 Fed. Reg. 21402, 21404 (1976).

²⁸ *Reserve Mining v. U.S.*, 6 E.R.C. 1609, 1613, 498 F. 2d 1073, 1980 (8th Cir. June 4, 1974).

²⁹ 6 E.R.C. 1613 n. 9, 498 F. 2d 1080.

The Environmental Protection Agency as recently as December 24, 1975, reaffirmed its position that the concept of threshold value has no practical significance for carcinogens. In proposing standards for vinyl chloride, the Agency quoted the Department of Health, Education and Welfare's Ad Hoc Committee on the Evaluation of Low Levels of Environmental Chemical Carcinogens:³⁰

No level of exposure to a chemical carcinogen should be considered toxicologically insignificant for man. For carcinogenic agents a safe level for man cannot be established by application of our present knowledge.

Several court decisions have supported the Environmental Protection Agency's position.³¹ Moreover, efforts to establish precise dose-response relationships have been no more satisfactory. The latency period between initial exposure to a carcinogen and occurrence of disease is said to be somewhere between 15 and 40 years.³² It is thus quite difficult to generate useful epidemiological data. Following the logic of the Eighth Circuit, then, the Environmental Protection Agency's ability to predict the likelihood and magnitude of disease resulting from exposure to cancer-causing chemicals, or put another way, in the terms of the Environmental Protection Agency's Interim Guideline for Carcinogen Risk Assessment, the Agency's ability to answer the questions that the Guideline poses regarding the likelihood that an agent is a human carcinogen and the estimated impact on human health, is severely limited, if not nonexistent.

Difficulties associated with extrapolation from animal studies (to estimate impact on human health in order to satisfy the Guideline for carcinogen risk assessment) confound the problem. In this context, the Environmental Protection Agency's Guideline states unequivocally:³³

The available techniques for assessing the magnitude of cancer risk to human populations on the basis of animal data alone are very crude due to uncertainties in the extrapolation of dose-response data to very low dose levels and also because of differences in levels of susceptibility of animals and humans.

The National Cancer Advisory Board's Subcommittee on Environmental Carcinogenesis, on June 2, 1976, made public its General Criteria for Assessing the Evidence for Carcinogenicity of Chemical Substances. The National Cancer Advisory Board agreed with the Environmental Protection Agency's conclusion:³⁴

Quantitative extrapolation from animal studies for the purposes of evaluating human risks entails large uncertainties at the present time.

At this juncture risk/benefit analysis as a technique to aid decision-making breaks down. The number of unknowns contributing to the measurement of risk make the measurement in the Environmental Protection Agency's terms "only . . . rough indications of effect."

³⁰ Ad Hoc Committee on the Evaluation of Low Levels of Environmental Chemical Carcinogens, The Evaluation of Environmental Carcinogens, Apr. 22, 1970, quoted in "Environmental Protection Agency's Proposed Standard for Vinyl Chloride," 40 Fed. Reg. 59532, 59533 (1975).

³¹ See, e.g., *Environmental Defense Fund, Inc. v. EPA*, 510 F. 2d 1292 (D.C. Cir. 1975).

³² "It usually takes 15-40 years between exposure to a cancer-producing chemical and manifestation of the disease. However, there are documented cases of a latency period as short as 1 year and as long as 75." Executive Office of the President, Council on Environmental Quality, Sixth Annual Environmental Quality Report 27 (1975).

³³ Health Risk and Economic Impact Assessments of Suspected Carcinogens, 41 Fed. Reg. 21402, 21404 (1976).

³⁴ National Cancer Advisory Board Subcommittee on Environmental Carcinogenesis, National Cancer Institute, General Criteria for Assessing the Evidence for Carcinogenicity of Chemical Substances 8. ——— J. Nat'l Cancer Institute ——— (1976).

Efforts to precisely measure risks posed by individual cancer-causing agents currently involve so many obstacles that they are an essentially useless exercise.

E. BENEFIT/COST ANALYSIS MAY INSTITUTIONALIZE A BIAS AGAINST THE PUBLIC INTEREST

Harold P. Green, Professor of Law at George Washington University, observed:³⁵

There are several difficulties inherent in giving complete validity to cost-benefit analysis. Benefits tend to be relatively obvious and immediate, while risks, by their very nature, tend to be relatively remote and speculative, especially where the technology is new and where epidemiological data are not yet available. In such cases, quantified benefits will almost always outweigh quantified risks. For this reason, the decisionmaking process may be better 'informed' if the risks are described qualitatively rather than quantitatively.

Rita Campbell, senior fellow with the Hoover Institution at Stanford University, writing on food safety regulation, made the mirror-image observation:³⁶

A difficulty in weighing large risks, sometimes of unknown probability, to a few persons against relatively small benefits to many people is that the significance of the large risk and its possible horror to the individual are more easily comprehended and thus well publicized. On the other hand, the relatively small benefit to each individual has little public impact, even though when multiplied manifold it may become much larger in total. Thus even the existence of these benefits, actual or potential, is often unknown by the person that may benefit.

From Campbell's observation the National Academy of Sciences concluded:³⁷ "[b]ecause of these factors, benefits may receive less weight than they deserve in regulatory decisionmaking."

The point that both Campbell and Green are making is essentially the same. When one side of the equation may be measured with relative accuracy and when that measurement, itself large, is compared with the uncertain and tentative measurement on the other side of the equation, the decision that benefit/cost analysis in that instance suggests may well reflect no more than the decisionmaker's capacity to quantify factors on each side of the equation. The benefits associated with the use of a given pesticide are, in Professor Green's terms, relatively obvious and immediate, while the risk associated with the use of a pesticide (the Environmental Protection Agency substitutes risk/benefit analysis for benefit/cost analysis in the context of certain regulatory decisionmaking including pesticides) believed to be a human carcinogen are, again in Professor Green's terms, relatively remote and speculative. The Environmental Protection Agency has by regulation required not only that risks and benefits be identified but that risks must "outweigh" benefits in order to be unreasonable.³⁸ (That this requirement is at variance with the Federal Insecticide, Fungicide, and Rodenticide Act is fully discussed in Chapter 4 on the Environmental Protection Agency.)

³⁵ Green, "The Risk-Benefit Calculus in Safety Determinations," 43 Geo. Wash. L. Rev. 791, 804 (1975).

³⁶ R. R. Campbell, "Food Safety Regulation: A Study of the Use and Limitations of Cost-Benefit Analysis" 22 Nat'l Academy of Sciences 11 (1974).

³⁷ Nat'l Academy of Sciences, "Decision Making for Regulating Chemicals in the Environment" 59 (1975).

³⁸ Section 162.11(a) (5), (6), 40 Fed. Reg. 28282 (1975).

Professor Green's conclusion, then, that "quantified benefits will almost always outweigh quantified risks" assumes special importance in the context of pesticide decisionmaking. For his conclusion suggests that the Environmental Protection Agency has institutionalized a bias against the public interest. Rather than helping the decision-maker make an objective and rational choice, benefit/cost analysis in the context of pesticide decisionmaking encourages the decision-maker to make a biased choice.

F. BENEFIT/COST ANALYSIS IS NOT A NEUTRAL AND OBJECTIVE DECISION-MAKING TECHNIQUE WHEN CRITICAL FACTORS MUST BE VALUED SUBJECTIVELY

The decisionmaker needs a common measure, such as a monetary value, in order to compare benefits and costs. Although it may seem exceedingly inappropriate to place a dollar value on a human life,³⁹ a practice "sometimes considered 'crass' or 'unfeeling,'" ⁴⁰ the question is whether such practice can be avoided.

In cost-effectiveness analysis (a variation of benefit/cost analysis), a decision between or among alternatives can be made without placing a value on human life. For example, the National Highway Traffic Safety Administration's comparison between the air cushion plus lap belt and the lap belt alone shows that if the single objective were to save lives, the former system would save more lives, and should be selected as the appropriate alternative. The next question then is whether to go ahead with the air cushion plus lap belt system.

This question asks whether the cost to manufacturers, which may be passed on to the public, is worth the saving in lives. Although the above estimates of the net lives saved varied, a decision not to issue a passive restraint standard must be understood as a decision not to save at least 2,700 lives, since that was the lowest of the diverse estimates. On one side of the equation is 2,700 lives; on the other side is the cost in dollars to manufacturers and the public resulting from a passive restraint requirement. The decisionmaker may either place a value on human life and multiply that value by the number of lives to be saved in order to make both sides of the equation commensurable, and thus expressly put a value on life, or he may, without putting both sides of the equation into dollars, make his decision subjectively. But this latter method would imply a value for human life, for a decision not to issue the standard would mean that the cost was too expensive to save 2,700 lives. And thus the cost divided by the number of lives that could have been saved equals the implicit value accorded each life by the National Highway Traffic Safety Administration. The National Academy of Sciences, following a similar example, concluded: ⁴¹

In the example presented here, choice determined value, rather than value determining choice. The problem of valuation cannot be avoided. Our thesis is

³⁹ For a variety of purposes and in a number of different contexts, human life is valued everyday. Workman's compensation, life insurance, personal injury and wrongful death lawsuits, all place monetary values on human life and limb. Russell W. Peterson, while Chairman of the Council on Environmental Quality, posed the question, however, that places the exercise in perspective: "What multi-millionaire, flat on his back with cancer, wouldn't give his entire fortune to recover?" Remarks by Russell W. Peterson, Chairman, Council on Environmental Quality, Society of Toxicology Annual Meeting (Mar. 16, 1976).

⁴⁰ See note 36 *supra* at 19.

⁴¹ See note 37 *supra* at 166.

that since valuation of non-commensurables is unavoidable, it is better to confront the choice of values openly and explicitly than to allow values to be hidden.

Moreover, by making the valuation explicit, internal consistency can be more easily achieved. For example, if a hypothetical safety measure $\#1$ would cost \$100,000 and would have the capacity to save four lives, the decisionmaker, if he decided to require such measure, would be valuing life at at least \$25,000 each. If the decisionmaker had the choice of requiring an alternative measure $\#2$ at a cost of \$120,000 but with the capacity to save six lives, he must be made to understand that a decision not to require measure $\#2$ would mean that he values human life at less than \$20,000 per life. It would be inconsistent, then, to order measure $\#1$ and not to order measure $\#2$. It may be that despite the inconsistency, the cost may have reached a level beyond which the decisionmaker refuses to go and the competing objective, that is the objective to avoid unreasonably burdensome costs, may have controlled the decision.

IV. Critical Factors May Be Neglected

The Environmental Protection Agency's Interim Procedures and Guidelines for Health Risk and Economic Impact Assessments of Suspected Carcinogens⁴² illustrate well the importance of considering all benefits and all costs. As noted above, the analysis of the risk side is limited primarily to an assessment of the likelihood and magnitude of the cancer risk. The Economic Impact Analysis of Proposed Regulatory Actions to Control Carcinogenic Pesticides, for example, is to contain:⁴³

"1. Identification of the major uses of the pesticide, including estimated quantities used by crop or other application.

2. Preliminary identification of the minor uses of the pesticide, including estimated quantities used by categories such as lawn and garden uses and household uses.

3. Identification of registered alternative products for the uses set forth in 1) and 2) above, including an estimate of their availability.

4. Determination of the change in costs to the [user] of providing equivalent pesticide treatment with any available substitute products.

5. Assessment of regulation impact upon user productivity (e.g., yield per acre and/or total output) from using available substitute pesticides or from using no other pesticide.

6. If the impacts upon either user costs or productivity are insignificant, a qualitative assessment of the regulation's impact on production of major agricultural commodities and retail food prices of such commodities."

By limiting consideration to risks and to benefits and by limiting the expression of risks to numbers of people likely to be affected, the Environmental Protection Agency is seeking to avoid expressly placing a value on nonmonetary factors such as human life.

As the foregoing discussion demonstrates, decisionmakers may explicitly value life or implicitly value life, but they may not,

⁴² See note 33 *supra*.

⁴³ See note 33 *supra* at 21405.

because of the nature of their trade-offs, avoid placing a value on life altogether so long as they insist on using benefit/cost analysis. Moreover, acknowledging that valuing life at a specific dollar amount involves numerous difficulties, there are, nonetheless, many costs associated with cancer that cannot be neglected and that are more easily quantified. The National Cancer Institute has estimated that \$1 billion will be spent in the United States for cancer research during 1976.⁴⁴ In-patient hospital care for cancer patients is estimated to cost \$1.8 billion each year.⁴⁵ When other disease-related costs are factored in, annual economic expenditures for cancer are estimated to run "[w]ell into the tens of billions of dollars."⁴⁶ In 1968, an estimated 1.8 million work years—not including time lost while sick—was calculated as lost due to cancer mortality.⁴⁷ The Council on Environmental Quality reported in December 1975:⁴⁸

Cancer killed a reported 358,400 U.S. citizens in 1974. About 1 million are under treatment for the disease, and each year 900,000 new cases are diagnosed. Of these, about one-third is skin cancers—troublesome, sometimes painful, but usually treatable, and with no significant impact on life expectancy; the other 600,000, however, are serious and are potentially fatal. The American Cancer Society estimates that 25 percent of the 213 million people now living in the United States will ultimately develop some form of cancer.

Health factors as well as economic factors may be ignored. Comparison of decisionmaking under the Federal Water Pollution Control Act with decisionmaking under the Federal Insecticide, Fungicide, and Rodenticide Act illustrates this point. The Administrator of the Environmental Protection Agency is directed by the Federal Water Pollution Control Act to publish a list of toxic pollutants for which he proposes to establish effluent standards.⁴⁹ In publishing such a list the Administrator is required to:⁵⁰

[t]ake into account the toxicity of the pollutant, its persistence, degradability, the usage or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms.

New York's Department of Environmental Conservation observed:⁵¹

The significance of bioaccumulation is that PCB's [a specific toxic pollutant] are accumulated in fish and other high lipid organisms to points far higher than the PCB concentrations to which the organisms are exposed. Experimental results introduced at the [PCB] hearing showed, for example, that Fat Head Minnows accumulate A-1254 [trade name of a particular type of PCB] to a point 200,000 times greater than the concentration in which they are placed.

For those chemicals that can bioaccumulate, then, the risk from low level ambient pollution is greatly increased. This is particularly true also if the chemical biomagnifies. The Department of Environmental Conservation continued:⁵²

Fish also accumulate PCB's through the food chain, by means of biomagnification. At each level of the food chain, organisms absorb the collected accumu-

⁴⁴ Dr. Frank J. Rauscher, Jr., Director, National Cancer Institute, Hearings on Departments of Labor and Health, Education, and Welfare Appropriations for 1977 Before the Subcommittee on the Departments of Labor and Health, Education, and Welfare of the House Committee on Appropriations, 94th Cong., 2d sess., pt. 4, at 147 (1976).

⁴⁵ National Cancer Institute, *Cancer Rates and Risks* 3 (2d ed. 1974).

⁴⁶ *Id.*

⁴⁷ See note 44 *supra*.

⁴⁸ See note 32 *supra* at 12 (footnotes omitted).

⁴⁹ 33 U.S.C. § 1317(a)(1) (1974).

⁵⁰ *Id.*

⁵¹ In re General Electric Co., N.Y. Department of Environmental Conservation, 6 Env't'l. L. Rep. 30007, 30014 (1976).

⁵² *Id.*

lation of PCB's in the lower-level organisms. Fish are relatively high on the food chain. Humans are higher.

When these two properties are combined with non-biodegradability, which means that the chemical may exist in a given medium (air, water, human tissue) for a long time, the threat posed by the chemical becomes even more serious.

On June 10, 1976, the Environmental Protection Agency published proposed toxic pollutant effluent standards under the Federal Water Pollution Control Act for aldrin and dieldrin, DDT (and its metabolites), Endrin and Toxaphene.⁵³ In the Agency's words: ⁵⁴

[T]he four toxic pollutants are among the most highly toxic *pesticides* known to man. All four have been clearly shown to result in lethal and sublethal toxic effects at low dose levels upon a wide range of fish, birds, mammals, and other wildlife, and have also demonstrated serious adverse health effects to man. Moreover, all four pollutants are highly mobile and persistent in the environment, and have demonstrated particular harm to aquatic organisms, in which they bioaccumulate greatly.

Nonetheless, the Environmental Protection Agency's risk analysis for carcinogenic pesticides (as distinguished from its risk analysis for toxic pollutants under the Federal Water Pollution Control Act) inexplicably neglects to clearly require consideration of, among other things, the properties of a chemical to bioaccumulate or biomagnify.

This list of omitted factors, although not comprehensive, does suggest the types of problems that may arise when consideration of benefits and costs is too narrowly limited. On the other hand, the danger inherent in requiring exhaustive consideration of relevant factors is that significant delay may result. The potential for delay from thorough analysis and the risk of prejudice from incomplete analysis both suggest the impropriety of reliance on benefit/cost analysis.

V. Conclusion

The limitations on the usefulness of benefit/cost analysis in the context of health, safety, and environmental regulatory decisionmaking are so severe that they militate against its use altogether. If techniques can be developed to more satisfactorily measure factors that currently defy measurement, problems associated with accuracy may become less important. But reliability will continue to be a factor so long as benefit/cost studies are performed by partisan advocates. Benefit/cost analysis of regulations in effect may be more productive than analysis of prospective regulation since at least some factors will be actually measured, but its use there too should be monitored carefully to ensure that it is aiding and not impeding objective and rational decision-making.

In this regard the Subcommittee emphasizes that when subjective valuation is unavoidable, benefit/cost analysis is neither neutral nor objective. Whenever benefit/cost analysis is used, all relevant factors must be considered in order to inform the decisionmaker's choice as fully as possible. If significant delay may result from this process, a different decisionmaking technique should be used. Finally, whenever benefit/cost analysis operates to bias a decision (such as its application by the Environmental Protection Agency in making decisions to limit or prohibit hazardous use of pesticides), its use is inappropriate.

⁵³ 41 Fed. Reg. 23576 (1976).

⁵⁴ *Id.* (Emphasis added.)

FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 16

REGULATORY REFORM ALTERNATIVES

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CHAPTER 16

REGULATORY REFORM ALTERNATIVES

I. Introduction

The preceding chapters have identified critical regulatory problems in agencies within the jurisdiction of the Committee on Interstate and Foreign Commerce and this Subcommittee. Chapter 17 summarizes our recommendations. It is the Subcommittee's belief that these proposals when adopted will increase the responsiveness and effectiveness of these regulatory agencies.

Before turning to these recommendations, your Subcommittee wishes to review certain popular, alternative proposals for regulatory reforms:

1. Congressional veto of regulations (provision for the Congress, its individual Houses or its committees to disapprove agency regulations);
2. Sunset (automatic termination of an agency or the effectiveness of its regulations absent re-enactment on a date certain); and
3. Executive control of regulatory agencies or regulations.

As a class, these mechanisms provide either "action-forcing" or "action-permissive" devices which would require the Congress, the Executive, or both to confront the issue of regulatory reform in a specified time frame. The various problems of the regulatory process—delay, inefficiency, special interest bias, etc.—are not addressed directly by any of these initiatives. Consideration of regulatory problems is deferred and reform requires some other action at a future date. In effect, they are legislative or executive branch reforms rather than regulatory reform proposals.

These proposals attribute the defects of regulation primarily to a lack of means in the Congress or the Executive to effect reform. For this reason, we first review the means available before we discuss the constitutional and policy implications of these proposals.

II. Existing Mechanisms of Reform

A. CONGRESS

1. *Remedial legislation.*—Article I of the Constitution vests all Federal legislative power "in a Congress of the United States, which shall consist of a Senate and House of Representatives." The President through his veto power has a major role in the legislative process.¹ However, ultimate legislative authority is preserved in the Congress

¹ Watson, "Congress Steps Out: A Look at Congressional Control of the Executive" 63 *Cal. L. Rev.* 983 (1975).

through the provision for override of presidential vetos by a two-thirds vote of both Houses of Congress.²

Administrative agencies were created and are constantly modified pursuant to this constitutional authority. Regulatory reform legislation is often under consideration by the Congress.

Examples abound: after oversight hearings in April and May 1975 on the Federal Energy Administration, it became clear to many Members that energy information being supplied to the Congress and the nation was inadequate. As a consequence, amendments to the Energy Policy and Conservation Act (then H.R. 7014) were offered to provide for General Accounting Office audits of energy information of producers of oil and natural gas and promulgation of related uniform accounting standards. On December 22, 1975, President Ford signed the legislation into law.³

Oversight hearings in the 93rd Congress relating to a potential weakening of consumer product safety standards through the use of sampling plans resulted in enactment into law during the 94th Congress of a prohibition in section 7 of the Consumer Product Safety Act of such sampling procedures.⁴ Subcommittee staff investigations revealed substantial abuse of the openness policy mandated by the Federal Advisory Committee Act; legislation was enacted to strengthen public access to such advisory committee meetings.⁵

This constant stream of "reform" measures reflects the commitment of Congress to improving the effectiveness and efficiency of administrative regulation. Individual commitment and public pressure for efficient and effective administrative agencies animates the legislative process.

The rules of the House and Senate require action by a majority. A corollary is that all procedural blocks will fall to a majority vote.⁶ If regulatory problems are identified and correlative solutions are concurred in by a majority, only the President stands in the way of reform. Even that procedural block is lifted by a two-thirds vote.

2. *The power of the purse.*—The power to appropriate has been characterized as one of the great powers of the Congress. Under the procedures of the House and the Senate, the appropriation of money is a two-step procedure.⁷ The first stage involves authorization of funds for particular agencies and their programs. Such authorizations are considered in the first instance by legislative committees and then by their respective Houses. House and Senate Rules provide for substantive amendments to authorization bills as well as amendments decreasing agency or program funding.⁸

Both steps provide opportunities for regulatory reform. In the recent Federal Energy Administration Authorization bill, the public relations budget of that agency was substantially curtailed after abuses

² U.S. Constitution Art. I, Section 7, clauses 2 and 3.

³ Energy Policy and Conservation Act, Public Law 94-163, Title V.

⁴ Consumer Product Safety Commission Improvements Act of 1976, Public Law 94-284, section 6.

⁵ Government in the Sunshine Act, P.L. 94-409, section 5(c).

⁶ *House Rules and Manual*, H. Doc. No. 416, 93d Cong., 2d Sess. (1975). *Senate Manual*, S. Doc. 94-1, 94th Cong., 1st Sess. (1976). Zinn (revised by E. Willett, Esq.), *How Our Laws are Made*, H. Doc. 94-509, 94th Cong., 2d Sess. (1976).

⁷ *House Rules*, *supra* note 6, Rule 21. *Senate Manual*, *supra* note 6, Rule 16. Authorizations of particular sums or "such sums as many be necessary" are not required but are considered implicit in the creation of a program. See IV Hinds' Precedents of the House of Representatives 3595.

⁸ *House Rules*, *supra* note 6, Rule 23. *Senate Manual*, *supra* note 6, Rule 22.

were discovered.⁹ Similarly in that legislation, energy information and energy regulation functions were administratively separated through amendment.¹⁰

The second stage of the funding process involves the reporting of appropriations bills by the respective appropriations committees of the House and Senate. Appropriations may not exceed authorized levels nor can substantive amendments be offered to such bills consistent with the rules of the House. However, retrenchment of appropriations is allowed.¹¹ This negative power can effectively control the level or existence of particular programs.¹² This device was employed by the Congress to prohibit the Environmental Protection Agency from spending funds to enforce parking surcharges that would discourage commuting to downtown areas by car. As EPA Administrator Train said, "if you're not allowed to spend money on a program, legally you can't pursue the program."¹³

3. *Impeachment.*—Potentially the strongest Congressional power is the power of impeachment. The Constitution provides the two Houses of Congress with a device to expel Federal officers from their posts.¹⁴ The suggestion that this mechanism is considered by the Congress in its dealings with regulators who consciously disregard their agency's statutory mandate was offered recently by Chairman John E. Moss.¹⁵ While mere disagreement by Congress with the decisions or policies of regulatory officials should probably not support an impeachment resolution, this mechanism may prove essential to removing officials who knowingly act contrary to the clear mandate of the law.

4. *Oversight.*—The power and will to probe agencies and programs is critical. Knowledge is a condition precedent to the intelligent use of the Congress' powers. Knowledge of agency inefficiency or abuse of its mandate makes it likely that public and congressional persuasion or legislative action will result in change. If legislation is required to cure such abuses, popular knowledge is the surest way to insure its passage and ultimate enactment into law.¹⁶

House and Senate Committees are required by the rules of the respective bodies to engage in "constant surveillance" of the agencies and programs within their jurisdiction.¹⁷ This is often a difficult task but it is essential to the Constitutional balance of powers. Oversight provides information on the effectiveness of regulatory mandates. Innovation and reform can only be effective if based on an understanding of why problems have arisen. For independent agencies, vigorous congressional review of agency activities is a special responsibility since control by the Executive Branch of these agencies is substantially limited by law. Your Subcommittee will make specific recommendations for improving oversight in Chapter 17.

⁹ Energy Conservation and Production Act, P.L. 94-385, section 110.

¹⁰ *Id.*, Title I, Part C.

¹¹ *House Rules*, *supra* note 6, Rule 21, clause 2.

¹² Horn, Stephen, *Unused Power*, Brookings Institution (1970), p. 180.

¹³ "For the Record" *The Washington Post*, April 21, 1976, p. A-21.

¹⁴ U.S. Constitution Art I, Section 2. Berger, Raoul, *Impeachment: The Constitutional Problems*, Bantam, New York (1974).

¹⁵ "Moss Weighs Impeaching 3 on EPC" *The Washington Post*, Sept. 2, 1976, p. B1.

¹⁶ Hamilton, James, *The Power to Probe*, Random House, New York (1976).

¹⁷ Legislative Reorganization Act, 2 U.S.C., section 190, *et seq.*

B. THE EXECUTIVE

1. *Budget approval.*—The President through the Office of Management and Budget approves the budgets of agencies for submission to the Congress.¹⁸ Although this authority can be abused, as noted in Chapters 2 and 6, of this report, it gives substantial power to the President. Directly, this power allows the executive to control the level of agency programs and, as a consequence, agency priorities. Indirectly, budget power gives particular weight to presidential suggestions on policy. The ability of the Office of Management and Budget to subvert the mandate of the Environmental Protection Agency is an example of the indirect use of budget approval power.¹⁹ A related power arises from OMB authority to approve positions and grades of persons employed by an agency. For example, a limitation on the number of attorneys assigned to enforcement can have a substantial impact on agency effectiveness. The Congress is beginning to limit these powers. Under recently enacted budget procedures, presidential rescissions and impoundments can be overturned by Congressional action.²⁰ The capacity for independent congressional analysis of budget information through the establishment of a Congressional Budget Office now denies the President an effective monopoly on budget information.

2. *Control of litigation.*—Few regulatory agencies have authority to go to court on their own behalf. Typically, they must request the representation of the Department of Justice. It is axiomatic in law that a right without a remedy is no right. The truth of this axiom is illustrated by the chapters on Consumer Product Safety Commission and Federal Trade Commission. The Department of Justice has refused to prosecute important cases on behalf of these agencies. In effect, that part of the agency's mandate was repealed through Executive action. The Executive thus governs regulation by control of litigation. To some extent the problems of these agencies has been addressed by recent legislation which provides the opportunity to litigate some cases if Justice refuses to act or does not act in a timely manner.

3. *Appointment power.*—Article II, Section 2 of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States." Pursuant to this power, the President appoints the heads of regulatory agencies. This power coupled with the often broad grants of discretion which these appointees will be called upon to exercise gives the President strong influence over agency priorities and activities. This constitutional provision insures that the President will have a major impact on regulatory issues.

4. *Legislation.*—The President is a political figure; the head of his party. Working in concert with the members of his party in Congress, the President is a key actor in the legislative process. Even when his party is in the minority in the Congress, its Members can recommend vetos. Further, the President can use the prestige of his office and attendant media attention to affectively advocate particular programs.

¹⁸ 31 U.S.C. 1, *et. seq.*

¹⁹ See Chapter 4 *infra*.

²⁰ 31 U.S.C. 1401-1407.

These factors, coupled with the expertise located in executive departments and agencies, gives the President substantial influence over regulatory measures, through the recommendation to Congress of proposed legislation, as well as over the level of appropriations for regulatory activities.

III. Congressional Veto

A. DESCRIPTION

Proposed Congressional veto legislation would provide the Congress, either House, or its jurisdictional committees with an option to veto specified agency actions, usually rules and regulations. Some version of this device has been enacted in 125 separate statutes.²¹

The assumption behind this proposition is that regulatory reform is a process of allowing Congress or one of its constituent units to control or limit overregulation by overzealous administrative agencies through legislative veto.²²

Though many variations of the veto approach are possible,²³ the most popular authorizes the veto by either chamber. This option is the one most likely to withstand a constitutional challenge. Such a proposal, applicable to agency rulemaking, has been reported by the House Committee on Judiciary and was rejected narrowly by the House under a procedure which requires a two-thirds majority for passage.²⁴ This bill, H.R. 12048,²⁵ and analogous Senate measures,²⁶ with wide support, are taken for purposes of this analysis as typical of this method of regulatory reform.

In summary, H.R. 12048 would provide 60 days during which a defined class of new rules would be subject to resolution of disapproval.²⁷ If within 60 days of promulgation a rule is disapproved by a concurrent resolution of both Houses, it is void. Also if one House adopts a disapproval resolution and the other House does not act, the rule is vetoed. Therefore, in the absence of a stalemate between the two Houses, H.R. 12048 would provide for one House veto of proposed rules.

With respect to previously promulgated rules, the bill would provide for "resolutions for reconsideration." Under this provision of the legislation, the passage by one House of a resolution of reconsideration would require an agency to reconsider and repromulgate a rule. Upon repromulgation, the rule could be vetoed pursuant to the procedures applicable to new rules.²⁸

²¹ Norton, C., "Congressional Review, Deferral and Disapproval of Executive Actions: A Summary and an Inventory of Statutory Authority", Library of Congress Congressional Research Service (1975).

²² Report to Accompany H.R. 12048, House Rep. No. 94-1014, Part 1, 94th Cong., 2d Sess. (1976). Debate on H.R. 12048, 122 Cong. Rec. 143 at H 10666, *et seq.*, September 21, 1976.

²³ See Norton, *supra* note 21 and Watson *supra* note 1 at 984-988.

²⁴ Vote on H.R. 12048, 122 Cong. Rec. 143 at H 10718, 265 ayes to 125 nays. This bill was considered under suspension of the rules which requires a 2/3's majority for passage. See Rule XXVI House Rules, *supra* note 6.

²⁵ H.R. 12048, 94th Cong., 2d Sess. (1976).

²⁶ See S. 2716 (Nunn), S. 2258 (Brook), S. 2903 (Reag), and S. 2878 (Javits), 94th Cong.

²⁷ Report to Accompany H.R. 12048 H. Rep. No. 94-1014, Part 1, 94th Cong., 2d Sess. 4-5, 14 (1976).

²⁸ *Id.* at 53-56.

B. ANALYSIS

1. *Constitutional issues.*—The ardent debate over the constitutionality of measures like H.R. 12048 is treated in detail in recent law journal articles.²⁹

The dialogue focuses on the extent of invasion by the legislative branch into prerogatives arguably preserved by the Constitution for the Executive. Because of limitations on standing (the right of an individual to press a claim on the basis of an alleged violation of a legal principle) no court has decided this issue definitely.³⁰ As a consequence, policy arguments, theories, court dicta, and other guides to what a court might do in a constitutional twilight zone are reflected abundantly in the statements and articles of those who have engaged in this debate.

Some sign posts are prominent. First, most analysts focus on the elusive separation of powers doctrine. Second, substantial questions are raised about the effect of congressional vetos on the President's veto power.

Separation of function was considered by the authors of the Constitution as an important barrier against tyranny.³¹ It was felt that no branch of government should be dominated and ultimately made the agent of another.³² This step was taken to insure that each branch of government would continue to check the others.³³ However, this checking function implies the possibility of some control by each of the three branches of government over the actions of the others. An inherent tension between preservation of independence and the power to check abuse is characteristic of the doctrine.³⁴ It is this tension that generates the first part of the debate.

²⁹ Glnnane, "The Control of Federal Administration by Congressional Resolutions and Committees", 66 *Harv. L. Rev.* 1353 (1953). Watson, "Congress Steps Out: A Look at Congressional Control of the Executive", 63, *Calif. L. Rev.* 983 (1975). Note, Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge 285, *Duke L. J.* 258 (1976). Stewart, Constitutionality of Legislative Veto, 13 *Harv. Journal on Legislation* 593 (1976).

³⁰ Glnnane, *supra* note 13, at 609-11. See also *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

³¹ According to Jefferson in his *Notes on the State of Virginia*:

All the power of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it turn their eyes on the republic of Venice. As little will it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others, as quoted by Madison in *The Federalist Papers*. The New American Library, New York, Number 48, pp. 310-311.

³² *Id.* Number 47 (Madison), pp. 300-308.

³³ *Id.* Number 48 (Madison), pp. 308-313.

³⁴ Madison recognized this tension and articulated a test to distinguish between the conflicting ideas of independence and authorities to check abuse. In analyzing Montesquieu's work, Madison stated:

From these facts, by which Montesquieu was guided, it may clearly be inferred that in saying 'There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates, or, if the power of judging be not separated from the legislative and executive powers,' he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, (the Constitution of England) can amount to no more than this, that where the *whole* power of one department is exercised, by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted. *Id.* Number 48 (Madison) pp. 310-311.

As to the effect on the presidential veto power, the issue is equally cloudy. It is a specific exception to the separation of powers doctrine that the President, the executive, participates in the legislative or policy-formulating process.³⁵ The primary intent of the authors of the Constitution was to provide the executive limited protection against legislative overreaching, a barrier which can be overcome by a two-third majority in both Houses.³⁶ Since a presidential veto is an exception to the general separation of function policy of the Constitution, most argue that the power should be narrowly construed.

Although the arguments for and against the Constitutionality of congressional veto should be reviewed with great care, the only recent, relevant statement of the Supreme Court favored the constitutionality of a mechanism similar to that embodied in H.R. 12048. It must be emphasized that this statement was contained in a concurring opinion and has little if any precedential value. According to Justice White in *Buckley v. Valeo*, 424 U.S. 1, a case involving the Federal Elections Commission:

I am also of the view that the otherwise valid regulatory power of a properly created independent agency is not rendered constitutionally infirm, as violative of the President's veto power, by a statutory provision subjecting agency regulations to disapproval by either House of Congress. For a bill to become law it must have passed both Houses and be signed by the President or passed over his veto. Also, "every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary . . ." is likewise subject to the veto power. Under § 433(c) the FEC's regulations are subject to disapproval; but for a regulation to become effective, neither House need approve it, pass it, or take any action at all with respect to it. The regulation becomes effective by nonaction. This no more invades the President's powers than does a regulation not required to be laid before Congress. Congressional influence over the substantive content of agency regulation may be enhanced, but I would not view the power of either House to disapprove as equivalent to legislation or to an order, resolution or vote requiring the concurrence of both Houses.

In terms of the substantive content of regulations and the degree of congressional influence over agency law-making, I do not suggest that there is no difference between the situation where regulations are subject to disapproval by Congress and the situation where the agency need not run the congressional gauntlet. But the President's veto power which gives him an important role in the legislative process, was obviously not considered an inherently executive function. Nor was its principal aim to provide another check against poor legislation. The major purpose of the veto power appears to have been to shore up the Executive Branch and to provide it with same bargaining and survival power against what the Framers feared would be the overweening power of legislators. As Hamilton said, the veto power was to provide a defense against the legislative department's intrusion on the rights and powers of other departments: without such power, "the legislative and executive powers might speedily come to be blended in the same hands."³⁷

Employing this test, it may be argued that unless the legislative veto mechanism denies the president powers specifically enumerated in the Constitution (ex. the appointment power, see, *Springer v. Philippine Islands*, 277 U.S. 189 (1928); *Buckley v. Valeo*, 424 U.S. 1 (1976); Cooper and Cooper, the "Legislative Veto and the Constitution," 30 *Geo. Wash. L. Rev.* 467, 501 (1962), legislative veto would not go to the "whole" of the executive's power and therefore would not offend the Constitution. This analysis is particularly relevant to agencies over which presidential discretion is severely limited (See Chapter 11, *infra*).

³⁵ *The Federalist Papers*, Number 48 (Madison) *supra* note 29 at 398 Watson, *supra* note 1, at 1044.

³⁶ 2 M. Farrand, *The Records of the Federal Convention of 1787*, 74-75 (1966 ed.).

³⁷ *Buckley v. Valeo*, 424 U.S. 1, slip opinion at 27-30.

Again while the mechanism addressed by Justice White was similar to that contained in H.R. 12048, caution should be exercised with respect to conclusions as to the Constitutionality of such devices.

2. *Policy issues.*—Rather than direct Congressional oversight resources to intensive reviews of significant agency operations, an approach reflected by this report, H.R. 12048 would require Congress to review essentially all regulations on a schedule dictated by the agencies. Congressional veto mechanisms would impose a substantial if not crushing burden on congressional committees. If the job envisioned by H.R. 12048 is to be done properly, committees would have to review both the rule itself and its underlying support material, the record of the agency action. Because of the 60 day rule to be imposed by H.R. 12048, all or substantially all rules would have to be reviewed as they were promulgated in order for jurisdictional committees to inform their respective Houses properly. Table 1 on opposite page indicates part of this burden on the House Committee on Interstate and Foreign Commerce alone.

Yet review of this procession of regulations would yield few if any comprehensive perceptions of regulatory problems or their solutions. The reintroduction of the legislative branch into the day-to-day specifics of regulation would return the Congress to the last century. During that era it was deemed essential to delegate authority to expert agencies in order to avoid swamping the Congress with unnecessarily detailed decisions after the broad parameters of policy, procedure, and judicial review had been established.

3. *Special interest domination.*—A primary concern with respect to H.R. 12048 is the second opportunity it gives special interests to seek freedom from regulatory constraints. After all of the procedures mandated by the Administrative Procedure Act have been completed, one more stage of review will be possible in the Congress, a Congress which would have limited knowledge of the pros and cons of the regulation, owing to the 60 day period of consideration. It would be a Congress with limited access to public and consumer input.³⁸

Special interest pressure would be heavy at the agency as well as in Congress. Opponents of agency action could argue to an agency that, failing a change in the proposed rule, they would go to the Congress for veto. Two options would be available to the agency. Either submit to the threat and weaken the proposed rule or seek public and congressional support. Neither option appears to be appropriate to the non-partisan nature of the regulatory agency.

4. *Delay and uncertainty.*—The procedures envisioned by H.R. 12048 automatically impose delays and uncertainty on the rulemaking process.

By providing for "resolutions of reconsideration", H.R. 12048 makes possible substantial changes in existing rules. This can be done by one House acting alone, both to force reconsideration and ultimately veto. If an individual company has already complied with a rule, it might incur the expense of changing to meet competition in the unregulated environment. Although the unrestrained competition could prove mutually destructive, the chance for a short-term competitive advantage will encourage a firm to seek every possible delay in complying with agency health, safety, or economic rules.

³⁸ See Statement of Joan Claybrook, Congress Watch, Hearings before the Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, U.S. House of Representatives Regulatory Reform, Vol. VI.

TABLE 1*

	Number of rules issued by the agency in 12- mo period	Number of pages required to publish rules in Federal Register	Amount of pages of support material in agency custody relating to such rules	Number of rules subject to § 603 (resolutions of reconsideration)	Number of pages required to publish rules in (4) in Code of Federal Regulations
	(1)	(2)	(3)	(4)	(5)
CPSC.....	133	45	63,500 ²	33.....	26,114 ²
FPC.....	37	146	No response.....	29.....	518
EPA.....	249	762	2,900,000.....	90 percent of all rules. ⁴	2,763
ICC.....	132	288	No response.....	4,398.....	1,524
NHTSA.....	48	95	2,920 ²	107.....	163
HEW.....	747	2,685	Too volumi- nous to calculate.	All of the rules. ¹¹	5,369
Department of Commerce ...	187	327	Approximately 10 ft. ³	1,042.....	1,456 ²
FTC.....	7	103	Approximately 40,000 pages.	152.....	1,058

*This table is based on responses to letters of inquiry sent to these agencies concerning the impact of H.R. 12048. Numbered footnotes identify the assumptions employed by answering agencies and are quotes from their responses to the subcommittee's letters of inquiry.

¹ In enumerating the rules "issued by" the Commission, only rules promulgated in final form and appearing in the Federal Register as "Rules and Regulations" were included, with the addition of several statements of policy and interpretation with regard to the Flammable Fabrics Act, which appear in the Federal Register as "Notices" but which are codified in the Code of Federal Regulations.

² In determining the amount of supporting material in the custody of the Commission relating to such rules, we have estimated the number of pages using the formula that 3 inches of filing space equals approximately 1,000 pages of documents.

³ The 1976 edition of the Code of Federal Regulations containing the Commission's rules (16 CFR pts. 150-end) has not yet been published. We have, therefore, estimated the number of pages required to publish such rules in the CFR using the formula that 1 page of printed rule in the Federal Register produces 2 pages of material when printed in the CFR.

⁴ Most of the rules enumerated in (1) require only 1 or 2 pages for publication in the Federal Register. Exceptions were rules involving new accounting procedures which required 10 pages, rules concerning the standards for conduct for employees which required 16 pages, rules in regard to advance payments, 26 pages, and regulations under the Privacy Act, 6 pages. During this 12-mo period, the Commission also established just and reasonable national rates for sales of gas from wells commenced prior to Jan. 1, 1973, through a rulemaking procedure. Publication of this rule required 14 pages in the Federal Register.

⁵ The number of pages of supporting material for the regulation is more difficult to assess since such papers have not been collected and counted in most instances. We do know that the support data for our technical standards is substantial. On several effluent limitations and guidelines (promulgated pursuant to the Federal Water Pollution Control Act) the records certified to courts in connection with subsequent litigation exceeded 100,000 pages each. Routinely, the records exceed 10,000 pages. It would be a conservative estimate that the background data for the 12 mo of rulemaking activity exceed 2,000,000 pages.

⁶ Virtually all of our regulations would be subject to the sec. 603 reconsideration requirements. We have 111 separate parts in title 40 of the present Code of Federal Regulations and only 10 appear to fall within the excluded categories itemized in sec. 601(2). Since some of the parts contain numerous subparts which are separate rulemaking actions, the CFR contains over 210 regulations which were subject to sec. 553 of the Administrative Procedure Act. This does not include promulgations since July 1975 when CFR was last published. We estimate that over 90 percent of our promulgations would be other than emergency rules or regulations of the type listed in sec. 601(2).

⁷ At the present time, EPA's regulations make up 4 volumes of the Code of Federal Regulations totaling 2,763 pages. Only approximately 58 pages are devoted to regulations which would not be subject to the sec. 603 reconsideration procedures. Because of Agency promulgations since the July 1975 codification, we expect the number of pages in the 1976 codification to increase by several hundred.

⁸ Some rules required only part of a column; this tally represents the actual number of pages as if all rules were published back to back.

⁹ It is of some interest to note that in connection with the above rules, NHTSA received an estimated 3,194 comments containing over 17,000 pages, and have on file almost 79,000 pages of supporting reference material. Much of this material relates to NHTSA standard 208, occupant crash protection.

¹⁰ Approximately 2,685 pages were required to publish HEW's NPRM's and final regulations in the Federal Register this year. This figure, however, is a bit misleading without further explanation. If Congress is to exercise its oversight responsibilities as set forth in H.R. 12048, then that oversight would be exercised prior to publication of rules in the Federal Register. That means that our rules and those of other Departments would be read in typewritten, draft form.

At least 7 typewritten pages (and often more) are required to fill 1 page of the Federal Register. As a result, congressional review of our regulations would have entailed reading 18,795 draft pages last year. We estimate that about 19,000 pages were required to publish all Federal regulations and notices of proposed rulemaking in calendar year 1975. A review of all those documents would have entailed reading 133,000 typed pages.

In reference to your request that the Department indicate the amount of supporting material relating to these regulations and notices, it is virtually impossible to calculate this. Most regulations go through several drafts: issue papers, internal staff working documents, results of public hearings, and written public comments are all part of the record of supporting materials for a regulation.

I trust you appreciate the tremendous volume of documents that would have to be sorted to give you specific figures in response to the 2d part of your question. I hope you will be able to accept my answer that the amount of supporting material is enormous and virtually incalculable in the absence of expending thousands of work hours to determine it.

¹¹ It would appear that virtually every regulation that has been issued by this Department and which is currently effective could be subject to a resolution for reconsideration under sec. 603. In the case of FDA, not only would all proposed and final rules promulgated by that agency in the future be potentially subject to resolutions of disapproval, but paragraphs (a) and (c) of the section would provide for reconsideration (and disapproval) of all previous regulations which now appear in ch. I of title 21 of the Code of Federal Regulations.

5. *Possible shift from rulemaking to adjudication.*—Rules generally cover whole industries in a single proceeding. This is the modern method of avoiding delay in compliance which characterized traditional administrative adjudications. If agencies are penalized for applying rules to entire industries, they may be forced to fall back on older, less efficient procedures of regulation by adjudication.

6. *Conclusion.*—The congressional veto mechanism seeks regulatory reform through provision of a power in the Congress or its constituent elements to veto agency rules. The underlying premise of this proposal is that the economy suffers from overregulation. Serious constitutional issues have been raised with respect to this device. Problems of delay, negative impact on oversight, and special interest influence also argue against this proposed remedy.

IV. Sunset

A. DESCRIPTION

Conceptually, the sunset mechanism is simple and straightforward. Under this approach, agencies, their regulations, specific programs, the authority to issue new regulations, or some combination of these is terminated on a date certain unless legislative action renews the agency's mandate. Usually applied to all agencies within a unit of government, a staggered schedule for termination spares the system from losing or renewing all agencies at a given time.

Coupled with termination dates in most sunset proposals are requirements for legislative reviews of agency performance.

Under Colorado's sunset law, a Legislative Audit Committee is required to submit a performance audit report to the Colorado legislature at least 3 months prior to the agency's termination date.³⁹ Under the proposed Regulatory Reform Act of 1976, (S. 2812) introduced by Senators Percy and Byrd, agencies are reviewed in the first instance by the Executive branch. Reports of such reviews are to be submitted to the Congress in the form of comprehensive plans which shall include recommendations for:

- (1) The transfer, consolidation, modification, or elimination of functions;
- (2) Organizational, structural and procedural reforms;
- (3) Merger, modification, establishment or abolition of Federal regulations or agencies;
- (4) Eliminating or phasing out outdated, overlapping or conflicting regulatory jurisdictions or requirements of general applicability; and
- (5) Increasing economic competition.⁴⁰

Absent executive action, committees of the House and Senate having primary legislative or oversight jurisdiction over an agency, in concert with their respective Committees on Government Operations, are to review the agency and submit comprehensive proposals for its reform. Pursuant to the proposed Government Economy and Spending Reform Act of 1976 (S. 2925) recently reported by the Senate

³⁹ H. R. 1088, 50th Colorado General Assembly, 2d Reg. Sess. (1976).

⁴⁰ S. 2812, 94th Cong., 1st Sess. (1975); House Companion bill H.R. 11450, 94th Cong., 2d Sess. (1976).

Committee on Government Operations, a consortium of the General Accounting Office, the Congressional Budget Office, the President, and jurisdictional committees is to provide the Congress with comprehensive evaluations of agency performance, including zero base budgeting reviews, on a statutory schedule prior to termination of an agency.⁴¹

Another mechanism often associated with sunset proposals transfers substantial policy-making responsibilities and opportunities to the executive branch. For example, the Percy/Byrd bill (S. 2812) would allow the President to submit modifications in regulatory agencies or their regulations to Congress, such changes to become law absent congressional veto. However, in pure sunset proposals, executive and legislative branches combine to modify an agency's mandate through legislative action and use or non-use of the executive veto.

B. ANALYSIS

As the preceding summary has indicated, two mechanisms are often associated with sunset proposals, (i) ready access to information necessary to identify regulatory problems and (ii) an occasional shift in the locus of power from the legislative to the executive branch of government. It is important to separate these mechanisms from the sunset device itself. A relationship between information and sunset is not essential. Information can be obtained for decisions without imposing an arbitrary termination date on an agency. According to Cutler & Johnson (their proposal to increase presidential power over regulatory agencies is analyzed in part V of this chapter), neither is sunset a necessary element of a plan which would expand executive powers over administrative or regulatory agencies.

Standing alone, the sunset device provides no information to the Congress nor does it shift the locus of decision-making to the executive branch. It merely terminates agencies, programs, regulations, or new budget authority absent reenactment. This device is regarded as "action-forcing."

As such, it is peculiar. It presumes that if the Congress, the Executive, or both had information which identified regulatory problems, no remedial action would be taken absent the threat of agency termination. If information relating to agency inefficiency, overlapping programs, delay, or other problems becomes public, as it should, the assumption that no action will be taken presumes that members of Congress and the President have constituencies which will countenance such inefficiency. Your Subcommittee finds this assumption difficult to accept.

The action-forcing discipline alleged to flow from sunset mechanisms is peculiar in another way. The prospect of termination arguably places a heavy burden on the agency and its friends to defend its activities. No similar burden is imposed on those who oppose regulation. Sunset assumes a substantial overabundance of agencies, programs, or regulations. Your Subcommittee has found this assumption to be largely false. As stated in previous chapters, affirmative

⁴¹ Report to Accompany S. 2925 Senate Report No. 94-1137, 94th Cong., 2d Sess., 12-13 (1976).

action is required for citizen participation, independence, and selection of employees. None of these needs can be met by having the sun set on a particular program or agency. Clearly, this draconian "cure" may be worse than the alleged illness.

Finally, even proponents of sunset indicate that its disciplinary effects can be avoided. Legislatures can simply re-enact agency mandates without reform. For this reason, sunset mechanisms are linked to public access to information about regulatory problems⁴² or a pre-existing desire in the legislature to effect reform.⁴³ As stated in the Report to accompany S. 2925, the Government Economy and Spending Reform Act of 1976:

The process cannot prevent Congress from simply re-enacting all programs currently on the books in a particular function, without asking any questions. But should the Congress go this route, it will be publicly acknowledging that it either cannot, or does not choose to, exercise greater control over what it has created.⁴⁴

The report continues by stating that "there will be enormous pressure for rationalizing program structures when the Congress reviews an entire function at one time and sees the degree of overlap and confusion, both between executive agencies and departments, and between the congressional committees themselves."⁴⁵

It would appear that proponents of the sunset device themselves regard access to relevant information both by the Congress and the public, not the sunset device, as the true means of achieving reform. At best, sunset provides an ordered schedule of useful reports to the Congress and the public on the performance of administrative agencies. This positive benefit can be achieved separately: it has no necessary relationship with the sunset mechanism.

C. NEGATIVE ASPECTS OF SUNSET

1. *Special interest influence.*—The most serious charge directed at sunset devices is that they will aid special interests. This allegation can be divided into several parts. First, it is argued that powerful interests will try to eliminate regulatory agencies which counterpose the public interest against their private power. They will be aided in this effort by the sunset concept itself, which places the burden of affirmative action on the agency and the public.⁴⁶ It is further argued that, even in a balanced struggle, an unorganized constituency of consumers interested in safe drugs, reasonable energy prices, or safe consumer products would be no match for an affluent and intensely interested and disciplined industry.⁴⁷ This criticism has been partially accepted by several proponents of sunset mechanisms. A Common Cause paper prepared for the Administrative Law Review recognizes that:

The younger, activist agencies that have offended powerful special interest groups because of their enforcement of safety, health, consumer, or environ-

⁴² *Id.* p. 12.

⁴³ Adams, "Sunset: A Proposal for Accountable Government," 28 *Ad. Law Rev.* 539 (1976).

⁴⁴ Report to Accompany S. 2925, S. Rep. No. 94-1137, 94th Cong., 2d Sess. 12 (1976).

⁴⁵ *Id.*, at 12.

⁴⁶ Adams, "Sunset: A Proposal for Accountable Government", *supra* note 41 at 571. Since affirmative action is required to extend a program, the burden of persuasion is on proponents of regulation. Under this system, proponents of deregulation of natural gas would have achieved their objective through stalemate between the two elected branches of government during the 94th Congress.

⁴⁷ Downs, Anthony. *An Economic Theory of Democracy*. New York, Harper (1957).

mental legislation might be more vulnerable than the older, established agencies that have developed strong constituencies both inside and outside the legislative body.⁴⁸

The least problematical sunset bill is S. 2925, the Government Economy and Spending Reform Act of 1976. This legislation, as introduced, would leave in place all rules and regulations but would deny agencies authority to implement new programs or regulations.⁴⁹ The Regulatory Reform Act of 1976 addresses this problem of exempting from termination rules which protect public safety, encourage economic competition, or protect consumer interests. Such an approach would under a broad interpretation cover most if not all rules or, alternatively, exempt only some consumer related rules. The definitional problem appears significant.

A second concern is the extent to which regulated industries will no longer cooperate with regulators. Such non-cooperation would result from speculation that the agency's authorities will soon be reduced or terminated. Hearings by this Subcommittee on the failure of several major oil companies to supply natural gas reserve information to the Federal Trade Commission provide an example of an industry's sweeping refusal to cooperate with an agency's fact finding.⁵⁰

2. *Inflexible schedules.*—The inflexible termination date of sunset puts a straightjacket on the calendar of the Congress and a President. No one can foresee what will require the attention of the legislative and Executive branches of government at some future date. This Nation's recent experience with the oil embargo and related energy problems counsels flexibility. If a crisis is at hand, sunset mechanisms should and must provide for either or both (i) the possibility of delayed termination or (ii) limited disturbance of necessary programs in times when the political branches of government are addressing other pressing problems. The only bill which seems to reasonably meet these criteria is S. 2925, the Government Economy and Spending Reform Act of 1976.⁵¹

D. CONCLUSION

The sunset device is straightforward. It provides for the termination of agencies, programs, rules or new program authority absent renewal of an agency's mandate. Often associated with the sunset device are proposals to develop and analyze information and to increase executive control of regulation. Such proposals, particularly those related to information, appear to derive whatever benefit is asserted from information. Disadvantages of sunset are the advantage given to those seeking to avoid regulation designed to protect the public and the likelihood that the President and the Congress may not reach timely agreement on reforms.

⁴⁸ Adams, *supra* note 44, at 540.

⁴⁹ Report to Accompany S. 2925, S. Rep. No. 94-1137, 94th Cong., 2d Sess. 20-22 (1976).

⁵⁰ Natural Gas Supplies, Hearings before the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 94th Cong., 1st Sess., Vol. 1, pt. 1, Serial No. 94-23, pp. 6 *et seq.*

⁵¹ Report to accompany S. 2925, S. Rep. No. 94-1137, 94th Cong., 2d Sess. (1976).

V. Executive Control of Regulatory Agencies or Regulations

A. DESCRIPTION

A discussion of a proposal recently made by Lloyd N. Cutler* and David R. Johnson in the Yale Law Journal completes this chapter's review of initiatives which seek regulatory reform.⁵² Cutler/Johnson suggest a grant of power to the President to intervene in agency activities. Previously discussed proposals sought to increase the power of Congress (veto) or attempted to require consideration of regulatory reform issues by both the legislative and executive branches of government (pure sunset). By contrast, the Cutler/Johnson proposal would permit the President to take an active role with respect to administrative agencies by Executive Order.

The President would be authorized to direct any regulatory agency (a) to take up and decide a regulatory issue within a specified period of time, or (b) to modify or reverse an agency policy, rule, regulation or decision. . . . Such action could be taken only by Executive Order published in the Federal Register, setting forth presidential findings that the action or inaction of an agency on a regulatory issue (or a conflict in the actions or policies of various agencies) threatened to interfere with or delay the achievement of an important national objective, and stating the reasons for such findings.⁵³

Since the vigorous use of such a power would modify statutory mandates, the authors would provide that:

Any such Executive Order would not take effect for 60 legislative days, and would not take effect at all if within such 60-day period either house of Congress adopted a resolution setting it aside.⁵⁴

B. ANALYSIS

The premise of the Cutler/Johnson proposal is the need for "accountability" and a correlative attack on agency "independence."

By giving power to the President to intervene in agency activities, he will be "chargeable with political responsibility for the agency's action, and will make him more accountable for not intervening when the electorate thinks he should."⁵⁵ To a lesser extent, the Congress will be held accountable for its decisions under its veto power over presidential initiatives. The authors clearly recognize that increased presidential accountability is a result of increased presidential power.

In order to support the powers to be granted the President, the authors attack the concept of agency independence. Independence is characterized as freedom from controls imposed by elected decision-makers. However, a series of mechanisms, reviewed earlier in this chapter, provide for substantial control over agency action by the President and primarily by the Congress.⁵⁶

Cutler and Johnson would change the relationship between Congress and the President by strengthening the Executive. This proposed shift in the locus of power to the Executive is ill-timed and unwarranted.

*Mr. Cutler is a well known Washington, D.C. attorney who represents Automobile Manufacturers and other industries subject to regulation.

⁵² Cutler, Lloyd N., and Johnson, David R., "Regulation and the Political Process," 84 Yale L.J. at 1395 (1975).

⁵³ *Id.* at 1413.

⁵⁴ *Id.* at 1415.

⁵⁵ *Id.* at 1417.

⁵⁶ *Infra*, Section II.

As discussed above, the authors of the Constitution regarded separation of function as an essential barrier to tyranny.⁵⁷ But the benefits of division of responsibility were buttressed by the structure of the legislative branch itself. Before a policy could become law, it would have to pass through two distinct legislative bodies, the House of Representatives and the Senate. This bicameral principle was determined to be the most effective defense against factions.⁵⁸ To preclude factions, it was regarded as essential to:

divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will permit.⁵⁹

Through bicameralism, the authors of the Constitution sought to insure that only the interests of the majority, and not those of factions, would control the critical policymaking powers of the new government.⁶⁰

Cutler and Johnson reject the importance of this structure when they write:

* * * it is difficult and time-consuming for the President and a working majority of Congress to unite to change a particular regulatory result or pattern of behavior by enacting a new law each time a change is desired.⁶¹

While they accept a congressional role in reviewing presidential initiatives, that function is characterized as limited "to an ability to check an arbitrary and isolated President."⁶² The power to *initiate*, the power located in the Congress by the Constitution as a check on factions, is transferred to the President.

As indicated in the case studies in this report, factions or special interests have influence over the executive branch without the balancing forces exerted in the Congress. Under this proposal, those interests would have the power to effect changes in the regulatory process unless vetoed by one of the Houses of the Congress. Thus, regulatory statutes which were passed after careful consideration and compromise among the various constituencies reflected in both Houses of Congress would be drastically changed if neither House vetoes a modification.

Since the one-House veto mechanism is substituted for the mechanisms created by the Constitution to control factions or special interests, great care must be exercised in reviewing the shifts in power proposed. First, the power to force the Congress to act is given to the President upon penalty of a change in the law. If this is necessary, it assumes that the constituencies of a majority of Members of Congress do not share this concern. It further suggests that the President's constituency is substantially different from those of a majority of Members. This is implicit in the mechanism. It strongly suggests factional rather than majority interests.

Second, under traditional procedures, Congress itself defines the time required to consider a proposal. Because of the complexity of regu-

⁵⁷ *The Federalist Papers* Number 47 (Madison), *The New American Library*, New York, pp. 300-308.

⁵⁸ See generally Watson, *supra* note 27 at 1034-1037.

⁵⁹ *The Federalist Papers* Number 51 (Madison) *the New American Library*, New York, p. 322.

⁶⁰ *Id.*, 320-325.

⁶¹ Cutler & Johnson, *supra* note 50 at 1401.

⁶² *Id.*, at 1414.

latory problems, this is important. If action is required on the basis of limited available information, constituent pressure will force such action. By contrast, Cutler and Johnson would provide only 60 days for Congress to review a proposal. Such a constraint would make it impossible for either House of Congress to do more than engage in a cursory review of the President's findings. This being the case, constituencies which knew of or pressured the Executive for a change would be the only ones to have their case fully prepared. One element of accountable power is the informed use of power. Informed judgment is eroded under this proposal.

Third, the mechanism proposed gives Congress a negative rather than an affirmative role. Unable to offer amendments, Congressional fine-tuning which creates policies acceptable to the many constituencies which make up a majority would be precluded. Thus, accountability through the bicameral system is attacked by this mechanism.

Finally and most important, the proposal transfers substantial power to a branch of government which has grown so powerful as to be called "imperial."⁶³ Recent abuses of executive power are well known. One of the principal sources for abuse has been the closed process of executive decisionmaking,⁶⁴ a factor not addressed by the authors. The formative stages of decisionmaking, the stages in which alternatives are considered and rejected, is closed to the public. Only after presidential prestige is committed to a proposal is the public allowed to comment on the initiative. Your Subcommittee regards this as an insufficient check on the executive and an unwise shift in the Constitutional balance of power.

⁶³ Schlesinger, Arthur M., *The Imperial Presidency*, Boston, Houghton Mifflin, 1973.

⁶⁴ Id., Halberstam, David, *The Best and the Brightest*, Fawcett, Greenwich, Conn. (1973).

FEDERAL REGULATION AND REGULATORY REFORM

PART V

CONCLUSIONS AND RECOMMENDATIONS



FEDERAL REGULATION AND REGULATORY REFORM

CHAPTER 17

CONCLUSIONS AND RECOMMENDATIONS

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CHAPTER 17

CONCLUSIONS AND RECOMMENDATIONS

The Subcommittee finds that the primary goal in the reform of Federal regulation should be to make regulatory programs function more effectively on behalf of the consuming public. The Subcommittee believes that the effectiveness of regulation can be increased significantly by—

- (1) creating mechanisms to foster a regulatory environment that is supportive of effective programs;
- (2) reforming current agency practices, to ensure evenhanded enforcement of law and selection of qualified regulatory officials; and
- (3) reducing and eliminating duplicative, anticompetitive, and ineffective programs.

Regulation must be reformed, in the Subcommittee's view, on an agency-by-agency, program-by-program basis. The process will inevitably be painstaking. It requires full recognition of the complexity of the American economic system and of related Federal regulation. This approach has worked well thus far with congressionally-initiated reform of the laws governing the Federal Trade Commission in 1974 and the Securities and Exchange Commission in 1975. While the Subcommittee recognizes the need for rapid reform, it is firmly opposed to arbitrary schedules or mechanisms to force Congressional and Executive action without sufficient deliberation.

Although we believe that most reform must proceed agency-by-agency, we have identified certain failings common to many of the agencies we studied. Our primary conclusion is that many of the flaws in regulation are related to a lack of agency responsiveness to the consuming public it was created to serve. Responsiveness is essential for two reasons: (1) the very legitimacy of agency action grows out of respect for the views of those affected and (2) acceptance of agency action usually depends on consultation with all affected groups, who can help agencies to eliminate potential problems of regulations before they go into effect.

Close analysis of the 40 major case studies presented in this report indicates that many agency actions reflect more than anything else a responsiveness to the interests of the regulated industry and a disregard of the underrepresented interests of the general public. The situation is not altogether surprising, given the resources, frequent communication with the regulatory agencies and cohesive organization of most regulated industries. We do not suggest that regulated industry should not make its views known whenever necessary in agency decisionmaking. We do say that, because of the superior resources available to most regulated interests, the process of decision-making often is unfair; the balance usually is tilted in advance against the public.

To work lasting change, fundamental adjustments in the environment of regulation and new structures for increasing the accountability of agency action to the broader interests of the consuming public will be necessary. In particular, regulation relating to health and safety needs to operate in a setting less dominated by political interference from, or on behalf of, regulated industry.

Our first set of recommendations is therefore directed at the need for creating new structures and an environment which is supportive of, rather than hostile to, effective regulation. It includes the following steps:

A. establishing new mechanisms for effective public participation such as an Agency for Consumer Protection and Public Counsel offices in certain economic regulatory agencies;

B. strengthening congressional oversight to increase the accountability of the agencies to the elected representatives of the public;

C. reorganizing Federal energy regulation and information gathering in a single independent agency and consolidating programs to promote the development of energy resources in a separate Executive branch agency;

D. merging three important areas of health and safety regulation—vehicle safety, food and drugs, and product safety—into a single independent commission to minimize duplicative efforts, reduce the potential for improper interference in these functions, and to permit increased accountability to Congress; and

E. increasing the openness of agency proceedings, to make them more accessible to the public.

The second set of general recommendations is intended to increase the effectiveness and fairness of regulation by reforming existing agency practices. We recommend:

A. eliminating obvious weaknesses in the enforcement efforts of regulatory agencies, and achieving improved and evenly applied sanctions;

B. improving the process for selecting regulators of high quality and strengthening conflict-of-interest laws and regulations applying to regulators on the job;

C. eliminating unreasonable delay and cumbersome agency procedures by increased use of informal (notice and comment) rulemaking proceedings;

D. eliminating the misapplication of benefit/cost analysis in rulemaking proceedings; and

E. separating promotional and regulatory functions by removing promotional programs from regulatory agencies.

The Subcommittee recommends consolidation and reduction of regulation in the following respects:

A. consolidation of regulatory programs in two areas: (a) energy and (b) safety and health, to minimize duplication in these functions;

B. elimination of anticompetitive regulation, particularly entry barriers, unless shown to be essential to public protection;

C. elimination of unnecessary and burdensome duplication, overlap, and conflict between regulatory programs such as those described in chapter 14; and

D. termination of individual regulatory programs that are determined by new agency evaluation programs to be ineffective.

Finally, the Subcommittee recommends continued development of mechanisms to enable consumers to have a stronger influence in legal proceedings affecting the regulatory agencies, such as:

A. restructuring the Federal citizen class suit;

B. reforming the doctrine of standing to permit citizen actions against agencies in the Federal courts; and

C. increasing the role of small claims courts as a means of consumer redress.

In the balance of this chapter, we discuss these recommendations in detail. Our recommendations regarding individual agencies appear at the end of chapters 2 through 10.¹

I. Recommendations to Increase the Responsiveness of Regulation to the Public

A. NEW MECHANISMS FOR EFFECTIVE CONSUMER PARTICIPATION

The failure of regulatory agencies to provide a structure for public participation in their proceedings undercuts the legitimacy of agency actions. Decisions reached by procedures that do not encourage full participation of all affected parties do not satisfy the fundamental precepts of democratic government. They do not provide for consent of the governed. The Subcommittee believes therefore, that agencies are obliged to do more than eliminate barriers to participation: they must take positive steps to assure meaningful presentation of representative public views, as well as the views of affected commercial interests, as a principal element in the decisionmaking process.

Lack of public participation also affects the quality of regulatory decisions. Testimony presented at the Subcommittee's regulatory reform hearings stressed the advantages enjoyed by special interests over groups representing the public interest in agency proceedings. Other testimony demonstrated that the public's lack of familiarity with manufacturing and marketing processes puts the consumer at a further disadvantage in the agency's proceedings. The Subcommittee finds that this disparity results in regulatory decisions that are skewed in the direction of the regulated. The agencies do not perform well enough for consumers. In chapter 13, we cite examples of proceedings where additional public participation might have affected the outcome so as to produce important general benefits. In the Conrail proceedings, cited in chapter 9, it is clear that all interests benefitted from advocacy of both industry and public perspectives.

On this basis, the Subcommittee urges a number of reforms both to reduce barriers to public participation and to build such participation directly into regulatory proceedings. Several of these mechanisms for increasing public participation complement each other and would assure that agency decisions more broadly reflect the interests of the general public.

¹ The Subcommittee also suggests further study of several issues not directly addressed in this report. Among these are: problems with adequacy, priorities and usefulness of the research components of Federal regulatory programs; Federal chartering of large corporations; and improving antitrust enforcement programs at the Federal level.

1. Agency for Consumer Protection

The Subcommittee urges the creation of an Agency for Consumer Protection (ACP), a critically urgent regulatory reform proposal. Bills creating the ACP passed both Houses during the 94th Congress. Unfortunately, the President announced his intention to veto the legislation and congressional leaders then decided not to complete action on it. Thus the issue must be dealt with afresh in the 95th Congress. Earlier versions of the legislation passed both the House and the Senate in different Congresses. The proposal has been subject to years of intense public debate and scrutiny. Its prompt enactment should be a top congressional priority.

The ACP would be an independent agency without regulatory functions, headed by an Administrator appointed by the President with the advice and consent of the Senate. The House bill states that the Administrator:

shall be a person who by reason of training, experience, and attainments is exceptionally well qualified to represent the interest of consumers.

The ACP would serve to represent consumer interests in proceedings of Federal agencies and courts. Given the broad scope of the Federal regulatory process, the ACP could participate only in selected proceedings.

2. Offices of Public Counsel

The Subcommittee recommends that Offices of Public Counsel be established by congressional action in the Federal Power Commission and the Federal Communications Commission and that the existing Office in the Interstate Commerce Commission have its authority expanded from railroad matters to all proceedings, including motor carriers. These Offices would develop expertise in the proceedings conducted by their parent agencies and would represent the public in such proceedings.

Offices of Public Counsel are appropriate for these agencies because their proceedings—primarily rate and license actions—are frequently extended and complex. Public Counsel could bring to bear the continuity and specialized skills needed for consideration of the technical and economic issues often central to these proceedings.

The case study appearing in chapter 9 on the Interstate Commerce Commission illustrates how such an Office can assist the public in placing its views before the decisionmaker. Attorneys in the Office of Public Counsel went to a number of communities and alerted citizen groups to the hearings and the assistance which they could provide. The result was more effective citizen participation as well as a more balanced hearing record.

The following requirements should be built into each Counsel's charter:

(a) decisionmaking independence from the parent agency (located organizationally within the parent agency but outside its usual chain of command and with independence to select and manage the actions in which the Office will participate);

(b) the Public Counsel appointed by the President for a fixed term, subject to Senate confirmation, and removable only for cause;

- (c) wide access to information within the agency;
- (d) information-gathering powers comparable to any other party before the agency or the courts;
- (e) authority to retain outside experts if necessary;
- (f) standing in all proceedings of the parent agency; and
- (g) authority to seek judicial review, and to refer appeals to the Agency for Consumer Protection.

3. *Funding of public interest participation*

The Subcommittee recommends that the Consumer Product Safety Commission, Environmental Protection Agency, Food and Drug Administration, National Highway Traffic Safety Administration, and Securities and Exchange Commission initiate programs to provide direct funding to public groups on the model of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (Public Law 93-637) under which the Federal Trade Commission presently funds public participation. It is the belief of the Subcommittee (confirmed by an opinion of the Comptroller General of the United States²) that these agencies currently have authority to undertake such funding programs. Once funding guidelines are established, agencies should include the cost of the program in their budget requests.

A case study on public funding and consumer participation in the Federal Trade Commission chapter describes the contributions made by the National Council of Senior Citizens to the Commission's development of trade regulations for the hearing aid industry. The Council received direct funding from the Commission under Public Law 93-637 to make its participation possible.

Funding of public participation is especially appropriate for health and safety agencies (Environmental Protection Agency, National Highway Traffic Safety Administration, Consumer Product Safety Commission, Food and Drug Administration) and agencies with broad jurisdiction (Federal Trade Commission and Securities and Exchange Commission), because their public impacts are often immediate and within the direct experience of a wide range of citizens. It may also be appropriate for the broadcast side of the Federal Communications Commission, because of the direct impact of the media on the public.

4. *Reducing other barriers*

Agencies, on their own initiative, should make available a handbook for citizen groups seeking to participate in agency proceedings, indicating in clear layman's language the types of proceedings conducted by the agency, means of receiving advance notice of agency actions, and ways of obtaining technical assistance from the agency where needed to participate effectively.

Reduction or elimination of filing fees, copying costs, transcript charges and other costs is also appropriate. Other steps might include expanding coverage and circulation of the *Consumer Register* of the Office of Consumer Affairs (a brief biweekly summary of *Federal Register* items of particular interest to consumers, indicating deadlines for public comments on proposed agency actions), and conducting

² The full text of the letter containing the Comptroller General's opinion is reprinted as Appendix D to this Report.

agency proceedings outside Washington, D.C. in locations of high public interest.

5. Obligations of agencies to seek out affected parties

The Subcommittee recommends that agencies establish programs to inform affected persons of regulatory decisions with adverse effects on particular groups whenever such groups may be unaware of pending proceedings or appealable decisions. For example, when the Environmental Protection Agency issues a restricted use permit for a pesticide which is otherwise banned, it creates for itself an affirmative obligation to assure that persons in affected areas are warned of hazards to which they may be exposed. In such case, it may prove appropriate to place the notice burden on the parties benefiting from the pesticide use, not the least of which is likely to be the producer of the pesticide. Ideally, of course, all groups in affected areas, including competitors and small businesses, should be brought into the decision-making process prior to the time the agency approves the action. The experience of the Interstate Commerce Commission's Office of Public Counsel, described above, can provide useful guidance for future efforts.

The reforms proposed by the Subcommittee for increasing public participation are designed to complement rather than to compete with each other. We have recommended that agencies initially establish either funding of public groups or an office of public counsel, but not both. The Agency for Consumer Protection, established with a modest initial budget, will be expected to intervene only in the most important agency proceedings. It is not likely that the ACP will be able to handle at the same time a large number of complex proceedings, such as a Federal Power Commission rate case and a Federal Communication Commission cable television or land mobile spectrum case. Thus, Offices of Public Counsel will be necessary if the public is to be represented adequately. It is not anticipated that the ACP on the one hand, and the Public Counsel or a funded public group on the other, would seek to intervene in the same proceedings, except under extraordinary circumstances.

B. IMPROVED CONGRESSIONAL OVERSIGHT

Quite as important as legislation is vigilant oversight of administration, and even more important than legislation is the instruction and guidance in political affairs which kept all national concerns suffused in a broad daylight of discussion . . . The informing function of Congress should be preferred even to its legislation function.—Woodrow Wilson, 1913

The Subcommittee shares the views of President Wilson. The Congressional role of oversight may well be preferred over its legislative function, especially with regard to maintaining and enhancing the quality and efficiency of federal regulation.

The vigorous exercise of Congressional oversight is essential to accountability. In creating regulatory agencies Congress delegated certain commerce powers to them.

If Federal regulatory agencies have not adhered consistently to their statutorily-imposed duties, one cause is the failure of Congress to use its oversight powers fully. This situation can be remedied by the reforms proposed in this report and with cognizance by Congress of the powers it has and a greater willingness to use them.

A number of recent proposals to reform regulation have focused on improving the oversight functions of the Congress. As discussed in a previous chapter, the Subcommittee does not support two major proposals it has assessed, the legislative veto of agency actions and so-called "sunset" legislation. Effective oversight, however, conducted by designated committees and subcommittees of the Congress, means intensified investigations, hearings, and reports focused on agency performance and carried out by professional committee staff.

At the same time, Congress has a responsibility to coordinate its oversight activities to avoid, where possible, duplication of effort and unnecessary burden on the agencies. House and Senate committees should develop an annual program plan and meet on a regular basis to avoid duplication.

A prerequisite to effective Congressional oversight is its ability to obtain the information necessary to monitor and assess agency performance. Several of the recommendations which follow are an outgrowth of our experiences with Federal agencies and are directed to strengthening the information-gathering powers of the Congress.

The Congress should clarify by statute or by use of its contempt power certain aspects of its right to receive information:

1. The doctrine of executive privilege

The doctrine of executive privilege is a creation of the Executive and the courts. The President in an apparent effort to avoid disclosure to the Congress of potentially embarrassing information regarding wire-tapping of American citizens has recently attempted to expand it.³

The Congress has been called the "grand inquest of the Nation." The people's elected representatives cannot legislate wisely without complete and accurate information. Congress and the courts must reaffirm the principle that the doctrine of executive privilege does not apply to lawful inquiry under Article I of the Constitution.

2. The extent of the congressional right to information

While it is clear that Federal agencies receiving Congressional requests for information may not invoke the "internal memorandum" exemption or other exemptions to the Freedom of Information Act to avoid responding, the status of provisions in other laws seems less clear to some officials. The constitutional principle should be unequivocally re-established that Federal agencies must supply the Congress with information requested by its committees acting within their respective jurisdictions, unless a statute *expressly* permits information to be withheld from the Congress.⁴

³ See *United States v. American Telephone and Telegraph Company, et al. Defendants: John F. Mass Member Individually and on Behalf of the U.S. House of Representatives and the House Committee on Interstate and Foreign Commerce Intervenor-Defendant*, Civil Action No. 76-1712, U.S. Ct. Appeals, Dist. of Col. (1976).

⁴ For a similar conclusion reached by the Committee on International Relations of the House of Representatives, see H.R. Rept. No. 94-1469, *Extending the Export Administration Act*, 94th Cong., 2d Sess., 14 (1976).

3. The extent of court jurisdiction over congressional requests for information

Whether and under what circumstances a Federal agency seeking to avoid compliance with a Congressional subpoena may obtain review in the courts should be clarified by statute. Court jurisdiction should be limited to determining (1) the jurisdiction of the committee, (2) the pertinence of the inquiry, and (3) the procedural validity of the subpoena. The courts should not substitute their judgment as to the need for the information subpoenaed. Article I of the Constitution and the doctrine of separation of powers preclude such a role for the Judiciary. Even where courts have reached a correct decision, the delay in the legislative process has been excessive. The limitation proposed would not necessarily apply where the subpoena was directed to a private party as distinguished from a Federal agency.⁵

4. Office of Congressional Counsel

The Congress should establish a new Office of Congressional Counsel to represent Congress, particularly in cases and controversies raising questions of the powers and responsibilities of the Congress vis-a-vis the Executive in which the Congress cannot rely on the Executive Branch for counsel. The office would provide assistance and advice in congressional oversight matters.

5. Reform of annual reports

The Congress should institute across-the-board reform of annual reports prepared by Federal regulatory agencies. Specifically, each agency should be required to indicate in its annual report the precise extent of compliance with applicable laws. Agencies should indicate, for example, whether statutory deadlines for initiating programs, issuing regulations, and publishing reports have been met.

In addition, each agency should include a detailed breakdown of the extent to which regulated industry is in compliance with current agency regulations. A proposed checklist for such an annual compliance report is contained in Appendix C of this report.

6. Increased authority for the General Accounting Office

The Congress should establish a stronger role for the General Accounting Office, including the provision of subpoena authority to be exercised in investigations ordered by the Congress, its committees, or subcommittees. In addition, the right of access of the General Accounting Office to such agencies as the Internal Revenue Service should be made clear.

7. Expansion of efforts by oversight subcommittees

The Congress should encourage the conduct of oversight by committees and subcommittees and assure that it is continuous. Oversight should include investigations, reports, documented critiques, hearings, funding reviews, and, where necessary, the use of compulsory process.

⁵ But see *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), for relevant self-imposed judicial limitations.

8. Adequate resources for oversight

The Congress should continue recent improvement in providing adequate budgets and professional staff for legislative oversight activities. We believe even a modest expenditure of funds for legislative oversight will invariably result in program efficiency and economy. House and Senate rules governing oversight should be reviewed with a view toward fuller use of congressional powers.

9. Sources of information

Agency employees who choose to come forward in good faith with evidence of inefficiency, waste, or wrong-doing should be accorded protection against reprisals, such as firing, demotion, loss of support staff, or transfer to undesirable locations.

10. Expanding the use of depositions

Members of committee and subcommittee staffs should be permitted, when appropriately authorized, to conduct depositions under oath when necessary to obtain essential oversight information.

C. REORGANIZATION OF ENERGY REGULATION AND SAFETY AND HEALTH REGULATION

The Subcommittee recommends reorganization in two major areas, energy and health, in order to group regulatory functions in related areas in a more rational fashion. We believe that a greater degree of responsiveness to the public interest can be achieved thereby and that more efficiently operating systems of regulation will result.

1. Consolidation of Federal energy regulatory functions

At present there is no single Federal agency with the authority and responsibility to implement an overall national energy policy or to carry out the objective of efficient utilization of the nation's energy resources. Energy regulation in the United States Government is severely fragmented; a number of agencies are involved in one or more facets of energy regulation. A careful reorganization of energy regulatory functions should be undertaken that would consolidate existing economic regulatory and information-gathering functions affecting energy, giving more coherence and greater coordination to the nation's energy policy and programs and removing the wasteful duplication of effort and expertise resulting from the multiplicity of agencies involved in energy regulation.

Since natural gas and oil are fuels which can be substituted for each other and decisions pertaining to one fuel impact upon the other, the responsibility for energy import policies, the regulation of oil, natural gas, and other petroleum products, including Federal lease management, should be consolidated in a single independent regulatory agency. These regulatory functions should remain insulated from programs designed to promote the development of energy resources and research, public education, or advocacy associated with such promotion. These promotional functions should remain within the Executive Branch. Coordinated energy policy and planning functions would remain a necessary part of both an independent energy agency and an Executive Branch agency. The reorganization of existing energy regulatory functions in this manner should eliminate or minimize currently

fragmented energy responsibility and accountability together with its attendant inconsistencies, delays, and duplication of effort.

2. Creation of a single Consumer Safety and Health Commission

We recommend merging the Consumer Product Safety Commission, the Food and Drug Administration, and the vehicle programs of the National Highway Traffic Safety Administration into a single Consumer Safety and Health Commission, structured as an independent regulatory agency. Consideration should be given to transferring other safety programs, such as the Department of Housing and Urban Development's regulation of mobile home safety, to this Commission.

The new agency would elevate the status of health and safety regulation and would command greater authority and flexibility than the three separated agencies currently possess.

The Subcommittee's study of the National Highway Traffic Safety Administration and the Food and Drug Administration leads it to conclude that the programs of these agencies would benefit greatly by removal from departmental bureaucracies in which they are now contained. In the case of NHTSA, political interference from the secretarial level and the White House, has been exercised to subvert its ability to carry out its congressional mandate. The NHTSA case studies on safety standards and the passive restraint rule clearly illustrate this. While political involvement in rulemaking may not always be improper, it has been consistently inappropriate in the case of this agency. With the Food and Drug Administration, the sense of being buried in the largest Federal bureaucracy, with several layers of clearance required on many actions, has had a chilling effect on FDA's ability to function. A major rationale for keeping FDA in the Department of Health, Education and Welfare, to facilitate its coordination with other units of the Department, such as the National Institutes of Health, has not proven accurate as shown in the case study on FDA's recent decision on chloroform.

Bringing these regulatory programs together in a new Commission is not intended to suggest a reduction in the accountability of these functions to the public, nor that the new agency should be relieved of the need to face trade-offs with other policy goals. The objective is to increase the accountability of these functions to the Congress which created them, and to reduce correspondingly the various forms of interference to which these programs are now subjected.

The merger also creates the potential for reducing duplicative efforts. These programs are largely directed at developing mechanical, chemical, or biological standards for consumer products. The scientific and technical skills necessary for such activities without doubt overlap. Common issues will arise in shaping and enforcing regulations for the merged programs. For example, a consistent approach could be developed for determining the applicability of benefit/cost analysis. Problems in organizing data collection for accidents and illnesses could be addressed jointly. Similarly, enforcement programs, including certification and recall, raise issues amenable to coordinated handling.

The Subcommittee recommends excluding the Environmental Protection Agency from the new agency because EPA's mission, rather than focusing on products, concerns hazards that are spread widely in the air and water of the environment. Regulation of these hazards

presents essentially different issues from those arising from regulation of product hazards. In addition, EPA currently employs 9,481 full-time personnel, compared to a total of 8,435 for the three agencies in the proposed merger. EPA's pesticide programs alone employ 958, more than either the National Highway Traffic Safety Administration or the Consumer Product Safety Commission. If the merged agency functions effectively, the question of EPA's relation to it can be reevaluated.

D. INCREASED OPENNESS IN AGENCY PROCEEDINGS

One of the most effective means of limiting the impact of bureaucracy and preventing the exercise of improper influence in agency decisions is to require that the business of the regulatory agencies be conducted openly. Sunshine is the best disinfectant. The Food and Drug Administration's manipulation of its Scientific Advisory Committee, discussed in the Chapter 8 case study on chymopapain, illustrates the compelling need for increasing openness in agency proceedings.

The Subcommittee recommends strict congressional oversight of implementation by the independent commissions of Public Law 94-409, the Government in the Sunshine Act, signed by the President on September 13, 1976. The Act requires that commission meetings be open to the public unless one of ten exemptions applies, that a full record be made of closed portions of any meetings, that *ex parte* communications be prohibited, and that there be legal recourse for citizens when commissions hold closed meetings illegally.

This recommendation follows from the Subcommittee's finding, presented in Appendix A-2 to the Report, that a distressing proportion of commission meetings have up to now been closed.

Chapter 6 on the Consumer Product Safety Commission shows that it is possible for an agency to conduct most of its business in the open and to benefit from such openness. The potential harm from failure to prevent *ex parte* communications is described in the discussion of the natural gas reserves investigation in the Federal Trade Commission chapter of this report.

With respect to the Executive Branch agencies, the Subcommittee recommends that the public should be permitted to attend all meetings related to agency decisionmaking which are attended by any persons outside the agency, including representatives of the regulated industry.

The requirement that issues be debated in the open and decisions reached in the open should be strictly enforced.

E. INCREASING THE INDEPENDENCE OF REGULATORY AGENCIES

The Subcommittee has found that regulated industry either directly or through a sympathetic response from the Office of Management and Budget, the Council on Wage and Price Stability and the White House, can undercut regulatory agency independence and objectivity. The National Highway Traffic Safety Administration case studies on safety standard programs and its passive restraint rule, among others, illustrate this. Another example is the Environmental Protection Agency's faltering regulation of the pesticide industry, described in the EPA chapter. Also relevant is the Securities and Exchange Com-

mission's reluctance to move aggressively against restrictions by the New York Stock Exchange on offboard trading of securities (Rule 394). The Subcommittee's recommendations are:

1. Simultaneous submission of agency budgets to Congress and the Office of Management and Budget

Congress should provide simultaneous submission of annual budget requests from both the independent regulatory commissions and the executive branch agencies to the Congress and to the Office of Management and Budget as is now required by the Consumer Product Safety Act.

2. Increased civil litigation authority

The independent regulatory commissions should be granted increased authority to initiate civil litigation, independent from Justice Department control. Extensive discussion of this problem in the chapter on the Consumer Product Safety Commission analyzes the need to disperse control over such litigation to regulatory agencies; further discussion of this issue may be found in chapter 14 on overlapping and duplicative programs. The current system, which allows a right of first refusal to the Justice Department in civil litigation, allows the Department to insinuate itself into commission policymaking.

3. Terminating the requirement for clearance of legislative proposals

Both the independent regulatory commissions' and the executive branch agencies' views and proposals on legislation and regulatory policy should not be subject to clearance by the Executive Branch.

4. Prohibition of political clearances

Congress should prohibit by statute the political clearance of any employee of an independent regulatory commission.

II. Reforms of Present Agency Practices To Make Regulation More Effective

A. EFFECTIVE ENFORCEMENT OF EXISTING LAWS AND REGULATIONS TO PROTECT THE PUBLIC

Statutes and regulations are only as effective as their enforcement. An unenforced regulation rapidly loses credibility.

Unfortunately, a number of Federal regulatory programs suffer from acute non-enforcement. One example is the Federal Power Commission's failure to enforce the delivery obligations of natural gas producers (chapter 10). Another particularly cogent example is presented in an Environmental Protection Agency case study is lack of enforcement of Federal auto emission standards (chapter 4). It is the Environmental Protection Agency's job to insure that cars and trucks do not pollute excessively. To do this, the Environmental Protection Agency must be able to determine who is responsible for the pollution performance of vehicles. Not until July 1976, did the Environmental Protection Agency exercise its authority under the Clean Air Amendments of 1970 to begin learning how well cars perform on the road. EPA spent more than \$4 million to learn that

tuned up cars pollute less than poorly maintained cars. Although the agency found a number of models in violation of clean air standards, no recalls were ordered. The result is that vehicle emission standards are not being enforced.

Chapter 9 on the Interstate Commerce Commission illustrates a broader instance of enforcement failure. In contrast to the Environmental Protection Agency, the failure does not revolve around a single substantive problem, but pervades the agency's entire enforcement program, including a lack of priorities and policy guidance, failure to delegate responsibility, and undue emphasis on insignificant cases.

Other chapters discuss enforcement failures in the programs of the Food and Drug Administration (illustrated by the cardiac pacemaker case study) and the Federal Power Commission (acceptance of producer-generated natural gas statistics without verification). Enforcement issues are also central in the Subcommittee's study of the Federal Trade Commission and the Securities and Exchange Commission since both are agencies whose jurisdiction cuts across industry lines and reaches much of interstate commerce.

The Subcommittee has traced these failures to a variety of factors, reflected in the following recommendations:

1. Monitoring

Agencies without effective means of monitoring the extent to which regulated companies are or are not in compliance must as a first step develop an appropriate combination of monitoring, testing, and reporting requirements to eliminate this gap. The case of the Environmental Protection Agency's mobile source emissions enforcement suggests a critical need to develop and apply improved testing systems. This report has also found serious compliance monitoring deficiencies at the Food and Drug Administration, the Federal Power Commission, and the Interstate Commerce Commission. Efforts to eliminate these deficiencies must assume a high priority for these agencies.

2. Agency authority

Two agencies, the Federal Trade Commission, and the Federal Power Commission, need stronger statutory authority to obtain information. The discussion of the Federal Trade Commission's Line-of-Business program graphically illustrates the difficulties an agency may encounter in fulfilling its information-gathering function. The Congress needs to set limits on the extent to which corporations may delay proceedings by challenging requests for information. The difficulties with subpoena enforcement are explained in chapter 3. The Federal Power Commission's authority to obtain reserve and curtailment data on natural gas should be clarified and strengthened to deal with the problems discussed in chapter 10.

3. Conflicting mandate

When an existing agency mandate is in conflict with its enforcement programs, Congress should respond by clarifying the mandate. For example, the Interstate Commerce Commission's mandate to promote and preserve the various modes of transportation, and to protect existing carriers from excessive competition may conflict with enforcement. This may explain the Commission's tendency to apply its enforcement efforts almost entirely against trivial violations. In gen-

eral, promotional and regulatory functions should not be joined in the same agency.

4. Inadequate sanctions

Several agencies with ongoing enforcement programs lack adequate sanctions or lack a sufficiently flexible array of sanctions. The Consumer Product Safety Commission, for example, has civil penalty authority under the Consumer Product Safety Act, but not under the Federal Hazardous Substances Act or the Flammable Fabrics Act. The criminal sanctions in these acts do not provide the Commission with a ready deterrent, because the Justice Department, to which the Commission must refer criminal matters, has declined to prosecute in an overwhelming majority of referrals. The Food and Drug Administration also has gaps in its enforcement authority. For example, the Food and Drug Administration lacks authority to require that manufacturers recall products found to be hazardous. The agency currently "supervises" such recalls, which are conducted voluntarily by the manufacturers. However, FDA's performance has been haphazard, as illustrated by the case study on cardiac pacemakers. The Subcommittee recommends that Congress provide the agency with clear recall authority and, in addition, clarify the agency's ability to obtain criminal sanctions through the Department of Justice, to strengthen FDA's enforcement capability.

5. In general

In general the agencies must develop a firmer commitment to enforcing the law. Enforcement must be fair and evenhanded. Private individuals and corporations must not be unnecessarily burdened. But uneven enforcement or nonenforcement reduces respect for the law and wastes the taxpayer's dollars. Better enforcement can come from recruitment of high caliber regulatory officials (discussed below and in chapter 12). It can also come from an improved climate for fair enforcement, which can be achieved by increasing regulatory agency independence. The Subcommittee recommendation to create new energy and regulatory agencies offers a concrete step in this direction.

B. IMPROVING THE QUALITY OF REGULATORS

Improving the quality of regulators means, above all else, avoiding appointment of regulators with a bias contrary to their legislated responsibilities. The adverse effect of regulators who lack commitment to statutory obligations is graphically illustrated by the chapter on the Federal Power Commission. The bias of recently appointed commissioners against carrying out the price and supply directives of the Natural Gas Act has gravely impaired the agency's ability to administer its responsibilities in the public interest.

1. Improving the system for selecting regulators

The advice and consent function of the Senate, properly exercised, can help assure that such appointments are avoided. The role of the Senate in passing on Presidential appointments to regulatory agencies might be strengthened by the development of criteria and by increased public participation. A series of recommendations to improve the quality of regulators is set forth in chapter 12 of this report. They

include White House notification to the public of prospective openings, identification of White House officials who are selecting nominees, and the solicitation of candidates by public announcement. The experience of the Securities and Exchange Commission, as described in chapter 2, suggests the potential for serious abuse and loss of independence caused by White House involvement in the personnel practices of the agencies. Non-Career Executive (i.e., political) appointments should be totally eliminated from independent regulatory agencies. However, independent regulatory agencies should be authorized to make appointments (without political clearance) to a limited number of non-career policy and advisory positions.

2. Minimizing conflicts of interest

Once regulators assume office, they may still be subject to influences which conflict with a diligent pursuit of the public interest. The Subcommittee offers several recommendations in this regard:

(a) Congress should prohibit by statute a Commissioner or an Administrator of an agency from accepting employment in any industry regulated by that agency for two years after leaving the agency. Persons nominated to these posts should be required to agree to the prohibition before the nominee can be confirmed by the Senate. The prohibition should extend to positions involving any representation of regulated industry in a legal or other capacity. The statute would not apply to Commissioners and Administrators in office at the time of enactment of the law and would not apply to other agency officials.

The Subcommittee believes that this measure is imperative as a means of restoring public confidence in the integrity of the regulatory agencies.

(b) Regulatory agency officials attaining Grade 15 or above should be subject to the following requirements upon leaving the agency:

i. Former officials must inform the agency of subsequent employment with a regulated entity or representing any aspect of regulated industry for a period of five years following departure.

ii. The agency must record all contacts with former officials employed directly or indirectly by regulated industry for a period of five years.

iii. These records are to be maintained in a public file in the office of the Administrator or Chairman of the Commission.

iv. The agency should monitor these contacts and where necessary impose additional restrictions on such contacts.

(c) Statutes governing the involvement of former agency officials in matters in which they took part, or of which they had knowledge while at the agency, are narrowly drawn, and should be amended to make their coverage more complete.

The provisions of 18 U.S.C. 207(a), which place a permanent bar on certain types of involvement of former Government employees or officers in matters in which they "participated personally and substantially" while in Government employment, should be strengthened by extending their application to persons acting in *any* capacity for anyone other than the Government, not merely to persons acting as agents or attorneys for anyone other than the Government.

The provisions of 18 U.S.C. 207(b), which place a one-year bar on certain types of involvement of former Government employees

in matters that were "under their official responsibility" within a one-year period prior to departure, should be strengthened by extending the bar to five years following departure.

(d) Each agency should forbid all ownership by regulatory employees of any financial interest, directly or indirectly through relatives or associates, in industries subject to the agency's regulations.

Similarly, no employees should be permitted to accept travel and other reimbursement from sponsoring groups when attending conferences or meetings. The regulations of a number of agencies, including the Food and Drug Administration, permit such arrangements. (See Appendix E.) The provisions of 18 U.S.C. covering conflicts of interests should be strengthened to reflect these requirements. Enforcement of such regulations by the regulatory agencies should be upgraded.

(e) The regulatory agencies should strengthen regulations covering informal off-the-record *ex parte* contacts during adjudicatory and rulemaking proceedings between regulatory officials and persons interested in agency actions. Such contacts should be eliminated. If any such contacts should occur under tightened rules, the substance should be recorded by the agency officials involved and a notation placed in the public file or docket for the relevant agency proceeding.

C. ELIMINATION OF UNREASONABLE DELAY AND CUMBERSOME PROCEDURES

The Subcommittee recommends, as a step toward reducing undue delay, that agency proceedings be conducted wherever possible according to informal notice and comment procedures, rather than by formal, on-the-record means. Informal rulemaking procedures, governed by section 553 of title 5 of the U.S. Code (formerly section 3 of the Administrative Procedure Act) are flexible and under section 553(c) allow for expedited proceedings.

The Federal Trade Commission chapter discusses the importance of adopting agency policy through rulemaking rather than through adjudication, the effect of which is generally limited to the individual case. Placing increased emphasis on rulemaking would give agency policy industrywide applicability and thus achieve a more efficient allocation of resources. The potential for delay, postponement and extension in formal rulemaking proceedings has also been illustrated at hearings by the Subcommittee on Commerce, Consumer, and Monetary Affairs of the House Committee on Government Operations, conducted in February 1976. That Subcommittee found that Federal Trade Commission proceedings extended an average of between two and three years in length. Congress has recognized the advantages in informal rulemaking proceedings and specifically provided for them in the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (Public Law 93-637). The Subcommittee recommends further legislation of this type.

Agencies using formal proceedings by choice are strongly urged to move to informal procedures. The Subcommittee recommends in addition that statutes mandating the use of formal procedures be amended to provide for informal rulemaking. While over-judicialization is not the sole cause of regulatory delay, and while formal procedures may be necessary in limited circumstances, the Subcom-

mittee believes that keeping formal procedures to an absolute minimum will contribute significantly to prompt yet fair rulemaking.

Reforms addressing the structure and procedures for judicial review may further reduce delay. These measures will be the subject of forthcoming recommendations by the Senate Committee on Government Operations.

D. ELIMINATING THE MISAPPLICATION OF BENEFIT/COST ANALYSIS IN HEALTH, SAFETY, AND ENVIRONMENTAL DECISIONMAKING

We recommend that benefit/cost analysis be used to organize and communicate information and that it not be allowed to operate as a substitute for conscious responsible choice. In many regulatory contexts, it is simply not applicable. While benefit/cost analysis can at times be useful in decisionmaking, it can also provide an effective disguise for subjective advocacy. The disparate estimates of number of lives potentially saved by a passive restraint standard faithfully reflected the interests of the parties sponsoring the respective analyses (chapter 5). To ensure that benefit/cost analysis may perform its intended function, the Subcommittee urges that it be used with great caution. Special care must be taken to identify *all* benefits and *all* costs of proposed actions. By narrowly limiting the range of risks and benefits associated with the use of carcinogenic pesticides, the Environmental Protection Agency neglected to consider issues that profoundly affect the public interest (chapter 4). The frailties of benefit/cost analysis should be acknowledged in situations where policy and value judgments cannot be avoided (chapter 15).

By hiding, in purportedly objective data and analysis, judgments regarding such factors as the value of life, health, or environmental quality, EPA evaded public accountability.

Where quantification cannot be achieved with a large degree of confidence in its accuracy, as for example, in efforts to measure cancer risk (chapter 4), the role of benefit/cost analysis must be eliminated or reduced to avoid inadvertently making biased, instead of objective, choices.

E. SEPARATION OF PROMOTIONAL AND REGULATORY AUTHORITIES AND FUNCTIONS

We recommend a separation of promotional and regulatory functions where they are joined in a single agency. This policy was applied with the division of the Atomic Energy Commission into the Energy Research and Development Administration and the Nuclear Regulatory Commission. The Interstate Commerce Commission is a definite candidate for such separation. The Subcommittee's proposals for reorganizing Federal energy regulation also reflect the goal.

III. *Recommendations for Consolidating and Reducing Regulation*

A major conclusion of this study—perhaps the most important—is that the popular hope of the least possible regulation, a generally desirable objective, cannot be satisfied by bulldozer tactics. For example,

the Subcommittee concluded that so-called "sunset" legislation and proposals providing for a congressional veto of agency actions are ill-advised approaches to regulatory reform. These proposals are discussed in chapter 16.

In the main, deregulation like other aspects of regulatory reform must be dealt with agency-by-agency, program-by-program. Decreased regulation is particularly undesirable in programs protecting the public from health and safety hazards including those which cannot be perceived (such as radiation from a microwave oven) and which cannot readily be avoided (such as air pollution from motor vehicles).

In some areas, the burdens of regulation on industry can be reduced by consolidating regulatory functions that are now scattered. Two major consolidations have already been proposed in the section of this chapter discussing increased agency responsiveness to the public. One was a recommendation for merger of three regulatory functions into a Consumer Safety and Health Commission. Also, a consolidation of the energy regulatory functions was recommended, with a parallel reorganization of nonregulatory activities relating to energy matters.

In addition, the Subcommittee makes the following recommendations:

A. ELIMINATION OF DUPLICATIVE, OVERLAPPING, AND CONFLICTING REGULATIONS

With the help of the agencies, the Congress should continue to identify unnecessarily duplicative, overlapping, or conflicting regulations. Chapter 14 describes several programs which we believe are duplicative in whole or in part and are candidates for consolidation. Table 1 following chapter 14 lists 86 program areas which the agencies themselves, in response to the Subcommittee's questionnaire, have identified as creating actual or potential overlap or conflict. These areas require further study to determine the nature and extent of actual overlap or conflict. Such a study, which should include specific recommendations from industry, consumers, and the agencies, should address the problem of overlap from the perspective of products and hazards (such as cancer-causing substances, noise, mobile homes, and pesticides) as well as by agencies. Once areas of serious duplication, overlap, and conflict are identified, Congress should eliminate them. We believe such a review should be required by law within a minimal time frame of ninety days. It should include duplicative programs as well as anti-competitive and ineffective programs, discussed below.

B. MINIMIZING ANTI-COMPETITIVE REGULATION

To the maximum extent possible under existing law, the agencies themselves should move to eliminate regulation which stifles competition, such as barriers to entry, rate setting, and other economic regulation, provided such regulation is not essential for continued protection of the public. This limited deregulation, which would allow competitive forces to operate more freely than at present, is urged, for example, in chapter 9 on the Interstate Commerce Commission, particularly regarding transportation entry barriers.

At the same time, it is important to recognize that regulatory action itself may be used to encourage competition. The Securities and Exchange Commission chapter concludes, for example, that the SEC could take more expeditious action to require the New York Stock Exchange to abrogate altogether its Rule 394 which restricts off-board trading of securities.

C. TERMINATING INDIVIDUAL REGULATIONS FOUND TO BE INEFFECTIVE

The agencies themselves must rapidly improve efforts to evaluate present regulations. Not only regulatory programs, but individual regulations should be subjected periodically to review by the agency, for the purpose of identifying and eliminating ineffective or counter-productive measures. Unfortunately most agencies have no such system of evaluation. The case study on benefit-cost analysis in chapter 5 on the National Highway Traffic Safety Administration indicates, for example, that pressure on NHTSA to predict costs and benefits of *proposed* regulations has overshadowed the agency's efforts to begin a system of evaluating the federal motor vehicle safety standards it has already issued. Further, the agency lacks a data system to enable it to determine definitively whether existing standards are producing value.

Periodic review and elimination of ineffective regulations will reduce unnecessary burdens on the consumer, taxpayer, and businessman, and free the agency for more useful work.

D. DEREGULATION AS A GOAL

Some conceive of regulatory reform primarily as deregulation. Others expect regulatory reform to be limited to an analysis of all costs of regulation, including hidden costs. They may challenge the continuance of regulatory programs that, in their view, impose excessive costs.

This Subcommittee believes an exclusive emphasis on costs imposes too narrow a standard for assessing the merit of regulation.

The General Accounting Office stated in a commentary on a 1975 Office of Management and Budget estimate of the cost of regulation:

The OMB approach in this effort is akin to a hypothetical corporation issuing an annual report which lists the corporate expenses in its summary statement but neglects to report the corporate revenues.

A proper assessment will recognize that not all regulatory efforts should be cut back and that in fact some regulatory programs need to be strengthened.

IV. New Modes of Citizens Redress

Federal regulation needs citizen participation. Recently, Congress has included provisions for citizen suits in several major bills, including Consumer Product Safety Act, the Clean Air Act, and the Toxic Substances Control Act. Citizens can further increase their direct in-

fluence on agency and corporate conduct through the following recommended reforms:

A. APPROPRIATE USE OF CLASS ACTIONS

A potentially useful means of consumer redress is the class action suit, whereby one or more members of a class sue for themselves and other members of a class against a common wrong. It is particularly important in situations in which individual consumers are marginally harmed, but in the aggregate their damages and the damages to the economy are substantial. An alternate but equally useful form of action would permit State Attorneys General to commence such actions on behalf of the allegedly injured citizens of a State. Such actions would, of course, have to be maintainable as class actions under the usual standards of Rule 23 of the Federal Rules of Civil Procedure, except as specified below.

Recent decisions of the Supreme Court have eroded the feasibility of bringing class actions. Two Supreme Court cases are illustrative of the continued weakening of citizen class actions.

In *Zahn v. International Paper Company*, 414 U.S. 291, (1973), the Court affirmed that many important classes of cases could be taken to Federal court as class actions only if each plaintiff has suffered damages of \$10,000 (the statutory jurisdictional minimum) or more. This means that a defendant can avoid accountability in Federal court for his actions if he limits the amount of each alleged violation. We think the rule is unduly harsh. It is imperative that Federal law allow courts to aggregate the claims of any number of plaintiffs alleging the same cause of action in order to meet the \$10,000 jurisdictional threshold.

In the more recent case of *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, (1974), the Supreme Court imposed upon plaintiffs severe restrictions in holding that each member of the class who can be identified with reasonable effort must receive actual notice of the pending action. Though such a requirement is apparently based on a strained interpretation of due process or the Federal Rules of Civil Procedure, the effect of the decision is to limit the ability of consumers to obtain any redress at all for economic losses. We think the Federal courts have a greater responsibility to hear the contentions of citizens than that suggested by these Supreme Court decisions.

Congress has already taken note of the need for class actions as a consumer redress mechanism in certain situations. The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (Public Law 93-637) provides for Federal court jurisdiction over consumer suits, including class actions, based upon violation of written or implied warranties provided a number of requirements are met.⁶

The Subcommittee therefore recommends:

(a) amendment of the United States Code to allow plaintiffs to

⁶ These requirements are set forth in 15 U.S.C. 2310(d)(3), which provides that no such action may be brought (A) if the amount in controversy of any individual claim is less than the sum or value of \$25; (B) if the amount in controversy is less than the sum or value of \$50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; or (C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred. In addition, a consumer must initially resort to any dispute settling procedure provided by the warrantor under Section 110(a)(3) of the Act (15 U.S.C. 2310(a)(3)), prior to bringing legal action.

aggregate claims in order to meet the \$10,000 jurisdictional minimum of the Federal courts;

(b) reform of the requirement of notice to class members, so that notice by publication is adequate where the number of the class members is large, and where a significant number of individual class members receive personal notice;

(c) that Congress consider specific provision for class actions in defined instances such as breach of consumer product warranties where the amount of damages and nature of the loss makes individual actions impractical; and

(d) that Congress should provide for continuing review in order to judge the effectiveness and fairness of such class actions provisions.

B. INCREASED ACCESS TO THE COURTS

A hurdle that must be met by consumers in bringing suit to set aside agency action as unlawful is complying with the doctrine of standing. The purpose of the standing doctrine is to ensure that the interests of the plaintiffs are sufficiently direct and immediate to assure that the relevant issues of a case will be clearly presented to a reviewing court. *Baker v. Carr*, 369 U.S. 186, 204, (1962).

Until very recently, the Supreme Court had been steadily broadening the criteria which would be sufficient to confer standing to sue upon an individual.⁷ The test was whether an individual had suffered "injury in fact" and whether the interest he sought to protect was "arguably within the zone of interests to be regulated by the statute or the constitutional guarantee in question."⁸

The judicial trend of liberalization of standing requirements culminated in the Supreme Court decision of *United States v. SCRAP*, 412 U.S. 660 (1973). The Court in the *SCRAP* decision concluded that an organization had standing to challenge agency action which harmed the environment, and stated that:

To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.

More recently, however, the court has been exercising more caution in applying the standing doctrine as evidenced by the cases of *Simon v. Eastern Kentucky Welfare Rights Organization*, 44 L.W. 4724 (decided June 1, 1976) and *Warth v. Seldin*, 422 U.S. 490 (1975).

In *Warth*, low-income persons and various organizations challenged the town of Penfield, New York's restrictive zoning ordinance on the grounds that it effectively excluded persons of low and moderate income from living in the town. The court said that plaintiff's "must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested the as-

⁷ The movement toward a marked broadening of the standing rules took a substantial step forward in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) and the companion case decided the same day, *Burton v. Collins*, 397 U.S. 159 (1970).

⁸ *Id.* at 152-53.

serted inability of petitioners will be removed.”⁹ The court found the record devoid of the necessary allegations. The court noted that while the fact that harm to plaintiffs may have resulted indirectly does not in itself preclude standing, indirectness of injury “may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants’ actions, or that prospective relief will remove the harm.”¹⁰ The court held that plaintiffs lacked standing because they had failed to show that the inability to obtain adequate housing within their means was fairly attributable to the town’s zoning ordinance instead of to other factors.

In *Simon*, several indigents and organizations composed of indigents sought to challenge a Revenue Ruling allowing favorable tax treatment to a hospital that rendered only emergency room services to indigents. The organizations brought suit on behalf of their members, and each individual brought suit on his own behalf and as representative of all other persons similarly situated. The Court concluded that the plaintiffs lacked standing to bring suit. The Court noted that “standing ‘focuses on the party seeking to get his complaint before a Federal court and not on the issues he wishes to have adjudicated.’”¹¹ The court noted that the standing question in the case turned on whether any individual plaintiff had established an actual injury. The court then assumed that some plaintiffs had been denied service but found that “injury at the hands of a hospital is insufficient by itself to establish a case or controversy in the context of this suit, for no hospital is a defendant. The only defendants are officials of the Department of the Treasury, and the only claims of illegal action respondents [plaintiffs] desire the courts to adjudicate are charged to those officials.”¹² The court found that it did not follow that the denial of access to hospital services in fact results from defendants’ Revenue Ruling. The court concluded that—

It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners ‘encouragement’ or instead result from decisions made by hospitals without regard to the tax implications * * *

It is equally speculative whether the desired exercise of the court’s remedial powers in this suit would result in the availability to respondents of such services.¹³

The court held that “unadorned speculation will not suffice to invoke the Federal judicial power,” and that the principle of the *Warth* case applied here.

In another recent case, the fact that the plaintiff brought a class action, and alleged that he represented many others similarly injured, was cited by the Chief Justice as an indication of the undifferentiated, nonspecific nature of the named plaintiff’s injury, further supporting the conclusion that the plaintiff did not have standing.¹⁴

The Subcommittee believes it is important that citizens have the right to challenge agency action by way of judicial review when such action is alleged to be illegal or contrary to the statutory mandate of

⁹ 422 U.S. at 504.

¹⁰ *Id.* at 505.

¹¹ 44 L.W. at 4728.

¹² *Id.* at 4729.

¹³ *Id.*

¹⁴ *Schlesinger v. Reservists Committee to Stop the War*, 94 S.Ct. 2925 (1974)

the agency involved. This concern was expressed in the Consumer Product Safety Act where Congress provided that judicial review of a consumer product safety rule may be had by "any person adversely affected by such rule or any consumer or consumer organizations" (15 U.S.C. 2060(a)). The effect of such a legislative provision is to confer standing, clearly and unambiguously, regardless of any limitations on standing reflected in the *Simon* and *Warth* cases. Also pending before Congress is legislation (S. 3296) introduced by Senator Kennedy which would allow any interested person to challenge an illegal agency action in court. The Subcommittee is impressed with the desirability of increased access to the courts by the public and recommends return to the liberalized tests of standing through passage of appropriate legislation, if necessary.

C. SMALL CLAIMS COURTS

Small claims courts were originally designed to provide a speedy and inexpensive system of justice for citizen redress. Their rules and procedures were to be simple and their accessibility to consumers relatively unlimited. Though small claims courts may not have fully met their ambitious goals, they provide an effective remedy to citizens in local jurisdictions. Studies relating to small claims courts have indicated that there is a great amount of unused potential in these courts. In its 1972 study on this subject, the National Institute for Consumer Justice recommended that Congress allocate funds for payment to the states to stimulate the establishment and maintenance of effective small claims courts.

Typically, the disputes most commonly handled by small claims courts involve fraud, deception, or misrepresentation to consumers, as well as overreaching and unfair repossession of goods and products. It would be foolish to think that the Federal Government could or should be in a position to resolve these disputes, particularly due to their small monetary amount. The establishment of more effective small claims courts and other consumer redress mechanisms will not only provide an added and more effective tool for citizen redress but will at the same time ease the burden upon the federal agencies which might otherwise be involved in settling the disputes involved.

The Subcommittee recommends that Congress allocate funds, at least on a trial basis, for payment to states to stimulate the establishment and maintenance of effective small claims courts, as well as to encourage the establishment of other consumer controversy resolution mechanisms. Passage of legislation now pending before both houses of Congress (H.R. 13830 and S. 2928) would meet this need and demonstrate concern of government for the rights of all citizens.

* * * * *

We believe that vigorous implementation of these recommendations will result in measurable improvement in the performance of Federal regulatory agencies and in their impact on the American public.

Approved:

John E. Moss, *Chairman, Subcommittee on Oversight and Investigations*

Richard L. Ottinger, *Member*

Anthony Toby Moffett, *Member*

Jim Santini, *Member*

W. S. Stuckey, *Member*

James H. Scheuer, *Member*

Henry A. Waxman, *Member*

Philip R. Sharp, *Member*

Andrew Maguire, *Member*

Harley O. Staggers, *Chairman, Committee on Interstate and Foreign Commerce, (ex officio)*

September 23, 1976

FEDERAL REGULATION AND REGULATORY REFORM
APPENDIXES

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APPENDIX A

SUMMARY OF SELECTED AGENCY RESPONSES TO THE SUBCOMMITTEE'S
JUNE 1975 QUESTIONNAIRES

THE UNIVERSITY OF CHICAGO
LIBRARY
540 EAST 57TH STREET
CHICAGO, ILL. 60637

APPENDIX A-1

AGENCY DENIALS OF INITIAL REQUESTS FOR INFORMATION UNDER THE FREEDOM OF INFORMATION ACT AS OF JUNE 30, 1975

Agency	Total number of FOIA requests ^a	Total number of FOIA denials ^c	Reasons for denials ^a							Reports prepared by agency	Geological information
			National defense or foreign policy (1)	Internal rules and practices of an agency (2)	Exempted by statute (3)	Trade secrets (4)	Agency memorandums (5)	Invasion of personal privacy (6)	Investigatory records (7)		
Consumer Product Safety Commission	(4)	21				9	6		3	5	
Federal Communications Commission	e 98	i 43				20	14			10	
Federal Power Commission	(f)	k 12				2	10				
Federal Trade Commission	1,122	l 135		1	6	20	71	1	3	87	1
Interstate Commerce Commission	26	m 16		2		6	11	1	1	4	
Securities and Exchange Commission	g 255	n 144		6	21	10	62	2	2	131	1
Environmental Protection Agency	280	o 19		2	2	7	10	3	3	3	
Food and Drug Administration	h 4,095	p 154				82	20	9	2	46	
National Highway Traffic Safety Administration	(i)	23		1	2	12	10	3	3	6	
Total	5,876	567		6	16	179	214	25	292	1	1

See footnotes on following page.

^a The Freedom of Information Act exempts certain data otherwise available to the public (5 U.S.C. 552(b)(1) through (9)).

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel; This formulation of exemption Number 7 was enacted as Pub. L. 93-502 Nov. 21, 1974. Prior to this date denials were based on the following language "(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency";

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

^b Number requests for information under the Freedom of Information Act as of June 30, 1975, unless otherwise noted. (Source: Telephone inquiries to agencies in September 1976.)

^c Number of denials will not necessarily equal the number of reasons cited because some denials will be based on more than one reason.

^d Data not available on separate FOIA requests; 3,900 requests for information were received in calendar years 1974-75.

^a FOIA requests prior to July 5, 1971, in which there were 33 denials.

^b FCC treats all requests for information as being filed under FOIA. There have been 246,986 requests, 7 files and documents in calendar years 1970-75.

^c FOIA requests from Jan. 1, 1975, to June 30, 1975.

^d Requests from Jan. 1, 1975, to June 30, 1975.

^e Data not available.

^f Does not include any denials from July 5, 1971, to Feb. 28, 1974, and from Mar. 2, 1975, to June 30, 1975. Also does not include one denial pursuant to section 0.461(e) of FCC's rules which covers requests relating to a hearing proceeding where an interested party is involved.

^g Four additional requests denied, 3 because not part of FCC's public record under section 1.36 of the Commission's Rules of Practice and Procedures and 1 in which no specific reason was cited.

^h Does not include any denials prior to July 1, 1970, and 1 denial to furnish an index and request for oral argument.

ⁱ Does not include 1 denial pursuant to Section 220 of Interstate Commerce Act, accounts, records, and reports.

^j Statistics not available on denials prior to Jan. 1, 1975 except for 6 resulting in litigation.

^k Includes only denials from Feb. 1, 1975, through June 30, 1975. Does not include 8 additional denials: 4 cited interim regulations, 2 involved 30 party consultation in connection with business confidentiality claim, 1 was statutory provision or court order requires information not to be disclosed, and 1 was record not in EPA's possession and not known to exist; 1 cannot be routinely handled—most material available through publication; 1 was pending discovery and determination of releasable records; 1 was minimum time for filing request—6 months; and 1 under the Federal Insecticide, Fungicide, and Rodenticide Act.

^l Does not include 2 additional cases, 1 involved a dispute on the fee schedule and 1 for undue amount of time to fill request.

^m Source: Replies to the subcommittee questionnaire of June 1975 (question 85 to commissions and question 69 to single administrator agencies).

APPENDIX A-2

PUBLIC ACCESS TO COMMISSION MEETINGS ¹

Agency	Regular ²	Special ³	Executive ⁴
Consumer Product Safety Commission.....	Closed.....	Open.....	Closed.
Federal Communications Commission.....	do.....	do.....	Do.
Federal Power Commission.....	Open.....	do.....	Not applicable.
Federal Trade Commission.....	Closed.....	do.....	Closed.
Interstate Commerce Commission ⁵	Not applicable.....	Not applicable.....	Not applicable.
Securities and Exchange Commission.....	Closed.....	Open.....	Closed.

¹ As of Sept. 1, 1976, prior to the enactment of Public Law 94-409—the Sunshine Act—signed Sept. 13, 1976, where meetings were open to the public, advance notice was given through the Federal Register and/or calendar of events.

² Meetings in which agency policies, regulations, and business are dealt with. These meetings are generally attended by Commissioners and, when appropriate, agency staff.

³ Meetings of a special nature—hearings, oral arguments before the agency, etc. These meetings are generally attended by Commissioners, agency staff, and the public.

⁴ Meetings in which agency policy, regulatory decisions, or adjudicatory decisions are made. These meetings are attended by Commissioners only.

⁵ ICC has no regular, special, or executive meetings, only Commission conferences with Commissioners only in attendance.

Sources: (1) Replies to the subcommittee questionnaire of June 1975 (question 18 to commissions); (2) telephone inquiries to commissions in June 1976.

APPENDIX A-3

OFFICE OF MANAGEMENT AND BUDGET DECISIONS TO INCREASE OR DECREASE LEVELS OF FUNDING AND PERSONNEL REQUESTED BY THE AGENCIES, FISCAL YEARS 1971-76

DECISIONS TO INCREASE (OR DECREASE) FUNDS AND PERSONNEL BY FISCAL YEAR

Agency	Fiscal year 1971		Fiscal year 1972		Fiscal year 1973		Fiscal year 1974		Fiscal year 1975		Fiscal year 1976	
	Amount (thousands)	Personnel	Amount (thousands)	Personnel	Amount (thousands)	Personnel	Amount (thousands)	Personnel	Amount (thousands)	Personnel	Amount (thousands)	Personnel
Consumer Product Safety Commission	(\$10,922)	(465)	(\$3,035)	(128)	(\$3,873)	(188)	(\$5,586)	(283)	(\$4,978)	(99)	(\$17,867)	(229)
Federal Communications Commission	(1,045)	(76)	(1,427)	(161)	(5,546)	(173)	(3,303)	(115)	(1,413)	(70)	(3,133)	(140)
Federal Power Commission	(6,307)	(645)	(6,807)	(32)	(3,574)	(208)	(4,844)	(178)	(5,330)	(119)	(15,085)	(143)
Federal Trade Commission	(5,018)	(347)	(6,785)	(537)	(5,225)	(447)	(3,565)	(321)	(16,895)	(228)	(6,464)	(75)
Interstate Commerce Commission	(463)	(65)	(2,411)	(313)	(3,930)	(283)	(2,817)	(204)	(160)	(130)	(1,545)	(148)
Securities and Exchange Commission					(3,003)	(300)	16,530	194	(1,543)	(225)	(7,390)	(526)
Environmental Protection Agency					(13,236)	(407)	(76,072)	(2,470)	(6,100)	(228)	(15,600)	(223)
Food and Drug Administration			(3,340)	(34)	(1,105)	(25)	(2,636)	(56)	(8,604)	(151)	(25,266)	(220)
National Highway Traffic Safety Administration	(627)	10	(2,180)	(20)	(2,031)	(25)	(82,293)	(3,433)	232	-----	(142)	(28)
Total	(24,442)	(1,388)	(19,985)	(1,225)	(39,489)	(2,031)	(82,293)	(3,433)	(44,791)	(1,220)	(94,493)	(2,032)

¹ NHTSA submitted data for the motor vehicle program only.

Source: (1) Replies to subcommittee questionnaire of June 1975 (question 79 to commissions and question 63 to single administrator agencies); (2) updated information received from agencies in July and September 1976.

APPENDIX A-4*

OFFICE OF MANAGEMENT AND BUDGET REJECTIONS OF AGENCY PROPOSALS
FOR CHANGES IN STATUTORY AUTHORITY, FISCAL YEARS 1971-76*Summary*

The Office of Management and Budget has not denied requests for changes in statutory authority from the six independent commissions. Two of these agencies, the Consumer Product Safety Commission and the Interstate Commerce Commission, submit such proposals simultaneously to Congress; for two others, the Federal Communications Commission and the Federal Power Commission, delays were noted as a result of OMB clearance procedures. All three Executive Branch agencies have met with OMB denials.

1. CONSUMER PRODUCT SAFETY COMMISSION

Section 27(k)(2) of the Consumer Product Safety Act provides for simultaneous submission to the Congress of requests for changes in its statutory authority, thus precluding the Office of Management and Budget from exercising denial authority over the Consumer Product Safety Commission's requests. The provision also stipulates that no government agency or official has the authority to require CPSC to submit proposals for approval, comments, or review prior to the submission to the Congress.

2. FEDERAL COMMUNICATIONS COMMISSION

Traditionally, the Federal Communications Commission submits proposals to the Office of Management and Budget as well as to interested parties and departments for their views. This process has occasionally resulted in delays, but there have been no denials. The Commission states that OMB has no authority to deny legislative requests of independent agencies.

3. FEDERAL POWER COMMISSION

The Office of Management and Budget has not denied or refused clearance of proposals for changes in FPC statutory authority. However, the Commission has experienced delays in obtaining clearance or has had to submit proposals without Administration endorsement.

4. FEDERAL TRADE COMMISSION

There have been no denials by the Office of Management and Budget.

5. INTERSTATE COMMERCE COMMISSION

There have been no denials by the Office of Management and Budget. The Interstate Commerce Commission submits all legislative proposals directly to Congress.

*Source: (1) Replies to the Subcommittee questionnaire of June 1975 (question 82 to commissions and question 66 to single administrator agencies).

(2) Updated information received from agencies in September 1976.

6. SECURITIES AND EXCHANGE COMMISSION

The Office of Management and Budget has denied no requests from the Securities and Exchange Commission for changes in its statutory authority.

7. ENVIRONMENTAL PROTECTION AGENCY

The Environmental Protection Agency reported four instances where requests for changes in the Agency's statutory regulatory authority have been denied or not cleared. These were (1) the regulatory authorities in the proposed Land Protection and Waste Recovery Act submitted in 1974; (2) the proposed amendment to section 307 of the Federal Water Pollution Control Act relating to rulemaking proceedings, also submitted in 1974; (3) the proposed Toxic Substances Control Act submitted in 1975; and (4) the proposed Solid Waste Disposal Act Amendments of 1976, submitted in April 1976 (EPA has been permitted to support some limited provisions contained in this proposal which are in other bills before the Congress). In fiscal year 1976, the Administration reevaluated its position on the toxic substances bill, S. 776, the equivalent to the Environmental Protection Agency's proposed Toxic Substances Control Act submitted in 1975, and forwarded to Congress a new position which would have added limitations to EPA's proposed authority to require comprehensive pre-market notification of proposed production of chemical substances.

8. FOOD AND DRUG ADMINISTRATION

There is no record of any denials by the Office of Management and Budget. The Department of Health, Education, and Welfare has a legislative program which is constructed, in part, through a process of negotiation and coordination among the Department, other interested parties, and the Office of Management and Budget. There have been occasions on which proposals have been withdrawn or substantially modified during this process. For example, the Food and Drug Administration proposed for including in the Department's legislative program an amendment to the Federal Food, Drug, and Cosmetic Act which would have provided for food establishment registration. This was done in the development stages of the Administration bill, H.R. 14256, the Food, Drug, and Cosmetic Amendments of 1976. Objections to this amendment were raised by the Commerce Department because it felt some of its programs would be affected. Subsequently, FDA withdrew its proposal after meetings with Commerce Department representatives could not resolve the dispute.

The Food and Drug Administration's experience with the current clearance process has not been one of unilateral OMB denial or revision of proposals, but rather alteration or withdrawal of a proposal.

9. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Five National Highway Traffic Safety Administration proposals submitted by the Department of Transportation were denied by the

Office of Management and Budget. These were proposals (1) to establish mandatory remedy and recall (92d Congress), (2) to grant enforcement power to complement existing general rulemaking power in section 103 of the Motor Vehicle Safety Act (94th Congress), (3) proposal to add to section 301 of the Motor Vehicle Safety Act authority to lease facilities for research, development, compliance, and other testing for highways and vehicles (94th Congress), (4) to reinstate traditional equity grounds for injunctions under section 153(c)(1) of the Motor Vehicle Safety Act (94th Congress), and (5) to make dealers and distributors subject to civil penalties for failure to provide consumer information to prospective purchasers of motor vehicles (94th Congress).

APPENDIX A-5

NUMBER OF CRIMINAL REFERRALS TO THE DEPARTMENT OF JUSTICE FROM REGULATORY AGENCIES, FISCAL YEARS 1971-75

Referring agency	Number of criminal referrals in fiscal years ¹					Total
	1971	1972	1973	1974	1975	
Consumer Product Safety Commission.....	(*)	(*)	10	6	23	29
Federal Communications Commission.....	1	0	10	6	2	9
Federal Power Commission.....	0	0	0	0	0	0
Federal Trade Commission.....	86	73	56	70	435	320
Interstate Commerce Commission.....	124	107	76	63	70	440
Securities and Exchange Commission.....	22	38	49	67	79	255
Environmental Protection Agency.....	* 24	181	372	197	122	896
Food and Drug Administration.....	51	71	118	88	45	373
National Highway Traffic Safety Administration.....	0	0	0	0	0	0
Total.....	308	470	671	497	376	2,322

¹ The above criminal referrals were made under the following authority: (1) Consumer Product Safety Commission: almost all referrals were under the Federal Hazardous Substances Act, sec. 5 (15 U.S.C. 1264) (ban of, or improper packaging or labeling of, any toy or other article intended for use by children, or any hazardous chemical substance); (2) Federal Communications Commission: 47 U.S.C. 301 (unauthorized radio transmission) 47 U.S.C. 302 (violations of regulations concerning marketing of nonapproved radio devices), 47 U.S.C. 502 (violations of other regulations (e.g., those concerning unauthorized frequencies)); (3) Federal Power Commission: the Federal Power Commission has authority to refer cases under 15 U.S.C. 717s (e.g., violation of terms of certificate of public convenience and necessity), and 16 U.S.C. 825m(a) (e.g., violation of terms and conditions of license) and it is the only agency that has not exercised its authority to make criminal referrals; (4) Federal Trade Commission: most referrals involve potential Sherman Act violations which the Federal Trade Commission refers under a liaison agreement with the Department of Justice (memorandum of Apr. 29, 1963, and letters of Mar. 8, 1963, Apr. 11, 1963, Apr. 18, 1963, and Apr. 26, 1963, Memorandum liaison arrangement of Federal Trade Commission with Antitrust Division of the Department of Justice, June 30, 1948), some involve 15 U.S.C. 52 (false advertisements), some 112 of the Consumer Credit Protection Act (Truth in Lending Act) (15 U.S.C. 1611); (5) Interstate Commerce Commission: 60 to 90 percent of the referrals are rate violations under 49 U.S.C. 317(b) (deviation from rates) or 322(c) (rebates and concessions), the remainder involve 18 U.S.C. 371 (conspiracy to commit offense or defraud) or 18 U.S.C. 1001 (false statements in matters within jurisdiction of agencies); (6) Securities and Exchange Commission: over 90 percent of referrals involve the Securities Act of 1933, sec. 17a (15 U.S.C. 77a(a)) (fraud in offer or sale of securities) or the Securities Exchange Act of 1934, sec. 10b (15 U.S.C. 78j(b)) (manipulative or deceptive device in connection with a purchase or sale); (7) Environmental Protection Agency: 75 referrals were made under the Federal Water Pollution Control Act, 33 U.S.C. 1319(c) (e.g., illegal pollutant discharges, violation of toxic and pretreatment effluent standards, false statements to the Agency); 205 referrals under Federal Water Pollution Control Act, 33 U.S.C. 1321(b)(5) (failure to report oil spill); 242 referrals under sec. 13 of the Rivers and Harbors Act of 1899 (Refuse Act) (33 U.S.C. 407) (deposit of refuse in navigable waters); 13 referrals under Clean Air Act (42 U.S.C. 1857e-8(c)) (violation of State implementation plan or of national emission standard for hazardous air pollutants); 5 referrals under Clean Air Act (42 U.S.C. 1857f-2) (import or sale of noncertified motor vehicles or tampering with emission control hardware); 394 under Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136(b)) (unlawful sale, transport, or use of pesticides); (8) Food and Drug Administration: at least 75 percent of referrals are under Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 342(a)(3) (unsanitary ingredients), and 21 U.S.C. 342(a)(4) (unsanitary conditions in preparation or packaging); (9) National Highway Traffic Safety Administration: the agency had no authority to make criminal referrals until 1976: (Public Law 94-364) (odometer fraud).

* Not applicable.

* Consumer Product Safety Commission became operational on May 14, 1973.

* Data not available for 1973.

* Through July 22, 1975.

* EPA was created on Dec. 2, 1970.

Source: Replies to subcommittee questionnaire of June 1975 (question 95 to commissions and question 79 to single administrator agencies).

APPENDIX A-6*

DEPARTMENT OF JUSTICE REFUSALS TO INITIATE LITIGATION REFERRED
BY REGULATORY AGENCIES—FISCAL YEARS 1971-76

CONSUMER PRODUCT SAFETY COMMISSION

The Department of Justice, including individual U.S. Attorneys, has declined to prosecute or has taken no action in 52 of 63 criminal referrals by CPSC. Various reasons have been asserted by the Department of Justice for its failure to adopt the Commission's recommendations, including insufficient evidence, stale case (violation occurred more than one year before discovery of unlawful conduct), heavy caseload, lack of prosecutorial appeal, and violations too minor to pursue.

FEDERAL COMMUNICATIONS COMMISSION

The FCC does not maintain data on the specific number of referrals to the Department of Justice during fiscal years 1971-76 nor does it keep records in those instances where the Department has refused to bring suit. FCC estimates about 15 civil cases referred to the Justice Department per year have been pursued by the Justice Department. The Department also has declined to present FCC views in three cases under the Freedom of Information Act: *Bast v. FCC*, *Telelobe-Pay-TV v. FCC*, and *Meredith Corp. v. FCC*. In these cases, the Justice Department has not agreed with the legal arguments proposed by the Commission.

FEDERAL POWER COMMISSION

FPC is authorized to represent itself in cases arising under the Federal Power Act and the Natural Gas Act. Thus in such cases, the relationship with the Department of Justice is limited to consulting and coordinating with the Solicitor General, who represents FPC in the Supreme Court. In fiscal years 1971-1975, eight certiorari recommendations by the FPC were not approved by the Solicitor General. No reasons were given for the refusals to follow FPC's recommendations.

In fiscal year 1976, the Department decided not to pursue Supreme Court appeals sought by the FPC in two cases. In *FPC v. NAACP* the Solicitor General did not accept the case because of opposition to the FPC's position by the Equal Employment Opportunity Commission. The FPC pursued the litigation on its own behalf before the Supreme Court and the Solicitor General filed a brief *amicus curiae* in the Court on behalf of the Equal Employment Opportunity Commission. In the other case, *FPC v. Conway Corporation*, the Antitrust Division of the Department of Justice was opposed to FPC's position in the case, but did not seek to prevent the FPC from litigating its own case before the Supreme Court.

*Source: Replies to Subcommittee questionnaire of June 1975 (question 93 to commissions and question 77 to single administrator agencies).

Updated information received from agencies in September 1976.

FEDERAL TRADE COMMISSION

The Department of Justice has declined FTC requests in five cases:

(1) *J.B. Williams Co., Inc.*

This was a civil penalty for a violation of an FTC order to cease and desist. The Court of Appeals held that the respondent was entitled to a jury trial and the Solicitor General, agreeing with the court, declined to petition for certiorari to the Supreme Court.

(2) *Genuine Parts Co.*

The Court of Appeals affirmed the District Court's order which granted a stay of penalties for failure to comply with an FTC order to file a special report. The Solicitor General declined to petition for certiorari because he did not believe that the decision would set a precedent for an automatic stay in such situations (an extremely adverse decision for the FTC) and therefore reversal was not critical. The Solicitor General also believed that the Supreme Court might view as unfair to the company the FTC's attempt to impose penalties while the appeal from the order itself was being litigated. (But see *Ford Motor Co. v. Coleman*, 402 F. Supp. 475 (D.D.C. 1975), aff'd. 96 S. Ct. 1656 (1976), upholding the propriety of a similar statutory scheme in the Motor Vehicle Safety Act.)

(3) *Lukens Steel Co. and United States Steel*

This was a civil penalty and injunctive relief action for alleged price fixing which violated an FTC order. After considering the FTC's request for one year, the Department of Justice declined to proceed but did not object to the Commission's filing the case itself, which the FTC did.

(4) *Consolidated Foods*

This was a civil penalty action. The Department of Justice declined to proceed but did not object to the FTC's filing of the case. The Commission prosecuted the action and the court entered a judgment assessing a \$25,000 penalty against the defendant.

(5) *ITT-Continental Baking Co.*

On judicial review of an FTC order, the Court of Appeals struck one paragraph of the Commission's order (instead of remanding to the FTC) because the court found that paragraph too broad. The Solicitor General declined to petition for certiorari because he thought that the issue was too narrow to justify Supreme Court review.

INTERSTATE COMMERCE COMMISSION

The Interstate Commerce Commission has the statutory right of independent representation in the courts in order to defend Commission orders. The Department of Justice cannot prevent the ICC from making its views known in court. Justice has refused to join in the defense of Commission orders on rare occasions, but has not furnished the ICC with a statement of its reasons.

The Department has declined requests in 76 cases during the six year period to press ICC enforcement cases. These refusals, primarily involving small truckers, have been based on a variety of reasons, including: "mere technical violations," "discontinuance of violation," "case too complex," "case too old," etc.

SECURITIES AND EXCHANGE COMMISSION

In fiscal years 1971-76, there were approximately 25 instances in which Commission recommendations to the Department of Justice for criminal prosecution were rejected, in whole or in part.

Reasons for such refusals vary. In most cases where a declination has been made it is only a partial declination. Other reasons cited included the following: (1) In the case of a broker illegally manipulating the price in four separate issues of securities, which would be considered as four separate cases, Justice may determine that proceeding against him for more than one of the manipulations would be unnecessary. (2) When Justice already has a grand jury investigation concerning a proposed defendant's violation of laws carrying greater penalties than violations of the securities laws, the Department may decline to prosecute the securities matters in favor of crimes with higher penalties. Other reasons noted were lack of jury appeal, unavailability of witnesses and proposed defendants, statute of limitations problems, and the subsequent development of new information.

The Solicitor General has denied only one Commission request to file a petition for writ of certiorari to the Supreme Court.

ENVIRONMENTAL PROTECTION AGENCY

The Environmental Protection Agency reports no instance in which it was deprived of an opportunity to make its views known to a court. In several cases, the Department of Justice has disagreed with the position of EPA but still presented the case as requested by the Agency or allowed EPA's lawyers to present the case.

FOOD AND DRUG ADMINISTRATION

Virtually all requests for the filing of civil proceedings have been granted by the Department of Justice. Over 25 percent, approximately 55 out of 200, of the criminal cases referred by FDA to the Department of Justice in calendar years 1972 through 1974 were terminated over the FDA's objection or without its concurrence. Prior to 1972, 30 to 35 percent of the cases were terminated. Types of action taken by the Department of Justice over FDA objection include refusals to file, refusal to include all defendants, and dismissal of defendants. On one occasion, a U.S. Attorney expressed fundamental disagreement with the entire notion of prosecuting individuals for Food and Drug Act violations.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

The Department of Justice has declined only once to initiate litigation, because it felt that the settlement offer was just and that the prosecution resources of the Department were too limited to pursue the matter.

APPENDIX A-7*

AGENCY ACTIONS THAT HAVE ACCELERATED, MODIFIED, OR DELAYED TECHNOLOGY IN REGULATED INDUSTRY, FISCAL YEARS 1971-75

(Selected Responses)

CONSUMER PRODUCT SAFETY COMMISSION

Significant technological changes have resulted in the following areas:

- (1) Clothing textile industry, i.e., marketable flame resistant fabrics;
- (2) Significant improvements in the safety of gas and electric ranges; and
- (3) Child-resistant packaging.

FEDERAL COMMUNICATIONS COMMISSION

Technological changes have been brought about in:

- (1) Low-cost mobile communications;
- (2) Customer-owned devices for connection to the telephone network;
- (3) Radio equipment manufacturing; and
- (4) 70-channel UHF tuner to achieve comparable ease of tuning between UHF and VHF television channels.

FEDERAL POWER COMMISSION

Accelerated or modified technology has occurred in:

- (1) generating unit reliability;
- (2) liquefied natural gas industry; and
- (3) synthetic natural gas industry.

FEDERAL TRADE COMMISSION

Federal Trade Commission does not regulate manufacturing, nor does it have direct impact on the advancement of technology in any industry.

*Source: Replies to Subcommittee questionnaire of June 1975 (question 47 to commissions and question 32 to single administrator agencies).

INTERSTATE COMMERCE COMMISSION

ICC regulation has encouraged the development of new technology in mechanical service units to protect shipments of perishables.

SECURITIES AND EXCHANGE COMMISSION

The SEC has devoted substantial resources to advancement of computer and communications technology in the following applications:

- (1) a consolidated transaction reporting system;
- (2) a composite quotation system;
- (3) NASDAQ, an over-the-counter information system, and other automated trading information systems; and
- (4) securities transaction processing.

ENVIRONMENTAL PROTECTION AGENCY

EPA is actively engaged in a multi-faceted effort to assist industry in developing and disseminating new technology. Among the new technologies are the following:

- (1) Zinc precipitation and recovery from viscose rayon wastewater;
- (2) Treatment recovery and re-use of copper wire mill pickling wastes;
- (3) Pyrolysis of industrial waste for oil activated carbon recovery;
- (4) Treatment of selected internal Kraft mill wastes; and
- (5) Color removal and sludge disposal process for Kraft mill effluents.

FOOD AND DRUG ADMINISTRATION

FDA has encouraged accelerated or modified technology in the following areas:

- (1) Adding certain nutrients to food without adversely affecting the flavor;
- (2) Uniformity in the formulation of foods; and
- (3) X-ray equipment, i.e., improved quality control and testing programs, accuracy of equipment, and X-ray field limitation and alignment.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

NHTSA safety standards have accelerated technological developments in the following areas:

- (1) antilock devices on tractor trailers;
- (2) automatic crash protection, i.e., airbags;
- (3) child restraint systems; and
- (4) a fuel tank that will allow flexibility during a crash to avoid rupture.

APPENDIX A-8*

AVERAGE TIME REQUIRED FOR COMPLETING AGENCY PROCEEDINGS AND
LENGTH OF HEARING RECORDS, FISCAL YEARS 1971-75

CONSUMER PRODUCT SAFETY COMMISSION

Agency proceeding	Average disposal time (months)	
	Fiscal year 1974 ¹	Fiscal year 1975
Rulemaking proceedings.....	11.7	16.1
Petitions.....	2.3	5.5
Adjudicative proceedings.....	3.2	3.3
Substantial hazard proceedings.....	6.0	6.0

¹ CPSC became operational on May 14, 1973.

Note.—Average length of transcript where hearings were conducted was 341 pages in fiscal year 1974 and 240 pages in fiscal year 1975.

FEDERAL COMMUNICATIONS COMMISSION

Agency proceeding	Average disposal time (months)				
	Fiscal year 1971	Fiscal year 1972	Fiscal year 1973	Fiscal year 1974	Fiscal year 1975
Rulemaking proceedings.....	14.1	11.2	8.1	8.6	6.4
Application hearings.....	10.1	11.9	11.7	7.1	4.5
Application proceedings ¹					

¹ Average disposal time not available for application proceedings but 3-4 months has been used as time in which average application should be processed.

Note.—Average length of hearing record for fiscal years 1971 through 1975 was 78, 147, 270, 218, and 75 pages, respectively

*Source: Replies to Subcommittee questionnaire of June 1975 (question 31 to commissions and question 16 to single administrator agencies).

FEDERAL POWER COMMISSION

Agency proceeding	Fiscal year 1971		Fiscal year 1972		Fiscal year 1973		Fiscal year 1974		Fiscal year 1975	
	Average disposal time (months)	Average length of hearing record (pages)	Average disposal time (months)	Average length of hearing record (pages)	Average disposal time (months)	Average length of hearing record (pages)	Average disposal time (months)	Average length of hearing record (pages)	Average disposal time (months)	Average length of hearing record (pages)
Pipeline rate cases:										
Full scale.....	12	850	48	2,000	24	625	24	1,400	48	1,550
Limited issues.....	24	2,512	18	1,511	12	148	18	680	24	504
Pipelines certificate cases.....										
Emergency curtailment cases.....										
Producer cases:										
Optional procedure.....										
Limited term service.....										
Hydroelectric license project cases.....	48	3,900			54	4,927	24	1,658	18	363
Electric rate cases:										
Full scale.....			24	1,295	16	1,901	24	3,764	36	547
Limited issues.....			15	2,128	18	805	30	417	21	231

FEDERAL TRADE COMMISSION

Agency proceeding	Average age of those pending (months)	
	July 1, 1974 ¹	July 1, 1975
Preliminary investigations.....	14.8	9.7
Formal investigations.....	36.0	22.1
Litigated matters.....	39.0	23.9

¹ Prior to fiscal year 1975, FTC did not have the capability to calculate this data.

Note: Average length of hearing records for formal investigations is 661 pages and for litigated hearings is 821 pages; hearing records are not applicable to preliminary investigations.

INTERSTATE COMMERCE COMMISSION

Agency proceeding	Average disposal time (months)				
	Fiscal year 1971	Fiscal year 1972	Fiscal year 1973	Fiscal year 1974	Fiscal year 1975
Orally heard rail merger cases.....	19.3	34.6	25.0	29.3	¹ 17.4
Rail finance cases (other than orally heard rail merger cases).....	4.7	6.2	6.4	6.0	-----
Motor carrier finance cases.....	9.2	11.7	12.1	12.2	14.8
Motor carrier operating authority cases.....	9.2	9.9	9.8	9.8	14.7
Motor carrier complaint cases.....	4.5	5.0	6.2	5.6	7.2
Water carrier cases.....	7.1	6.6	12.1	14.7	10.9
Formal docket cases (rate complaints and investigations).....	12.4	13.9	17.6	16.0	18.7
Investigation and suspension cases (motor).....	1.7	1.8	2.1	2.0	2.3
Investigation and suspension cases (rail).....	6.1	4.8	5.8	5.1	7.7
All other cases.....	14.4	14.5	12.6	13.4	16.2
Total, all cases.....	7.8	8.6	8.8	8.9	13.2

¹ Includes average for both orally heard rail merger cases and rail finance cases.

Note: Average length of hearing record for fiscal year 1974 was 338 pages.

SECURITIES AND EXCHANGE COMMISSION

Agency proceedings in SEC fall into three categories: rulemaking, processing of registrations, and adjudication.

1. *Rulemaking.*—These proceedings vary from as little as one or two days to a complex matter running in excess of three years; therefore, there is no typical rulemaking procedure. The length of hearing records could only be found through an examination of voluminous files, making it extremely costly and time consuming. However, SEC sampled 8 such proceedings which had an average of 2,122 pages of testimony.

2. *Processing of registrations.*—For the registration of statements under the Securities Act of 1933, the only meaningful measure of elapse time is the average of about one month between the receipt of a registration statement and the initial letter of comment issued. Disposal time of application for exemption from certain provisions of the Investment Company Act of 1940 varies from around 3 months without a hearing to over 15 months where a hearing is conducted. Under the Public Utility Holding Company Act of 1935, applications for financing average six weeks from filing to issuance of an order. Length of hearing records is covered under adjudication matters.

3. *Adjudication.*—Detailed statistics kept on such proceedings are as follows:

SECURITIES AND EXCHANGE COMMISSION

Agency proceeding	Fiscal year 1971		Fiscal year 1972		Fiscal year 1973		Fiscal year 1974		Fiscal year 1975	
	Average disposal time (months)	Average length of hearing record (pages) ¹	Average disposal time (months)	Average length of hearing record (pages) ¹	Average disposal time (months)	Average length of hearing record (pages) ¹	Average disposal time (months)	Average length of hearing record (pages) ¹	Average disposal time (months)	Average length of hearing record (pages) ¹
Stop orders ²	3.5	0	14.0	692	5.0	121	0	0	0	0
Suspensions ²	9.1	79	5.2	513	9.5	53	9.0	200	8.5	291
Broker-dealer ³	11.0	604	10.9	1,233	11.5	438	12.5	521	17.4	648
Other ³	8.0	193	10.9	278	9.0	0	0	0	0	0
Public Utility Holding Company Act of 1935 ⁴	13.7	1,375	34.0	3,109	13.8	237	44.0	1,719	11.3	2,194
Investment company exemptions and notices ⁴	13.4	1,410	9.2	436	10.5	0	17.5	566	18.0	153
Investment advisers ⁵	9.3	1,108	11.0	377	7.3	0	6.4	0	11.2	120
2(e) proceedings ⁶	20.0	306	14.5	619	7.3	0	8.5	8	4.4	8

¹ Although average number of pages for all proceedings was given, only those hearings with any transcript are averaged.

² Securities Act of 1933.

³ Securities Exchange Act of 1934.

⁴ Investment Company Act of 1940.

⁵ Investment Advisers Act of 1940.

⁶ Commission Rules of Practice, 17 CFR 201.

ENVIRONMENTAL PROTECTION AGENCY

Agency proceedings in EPA fall under rulemaking, permit issuance, cancellation, and suspension.

1. *Rulemaking*.—Action under the Clean Air Act varies widely with intervals exceeding a year not uncommon and the record averaging 1,000 pages with complicated or controversial cases yielding many thousands of pages. No meaningful generalization can be drawn for the issuance of regulations under the Federal Water Pollution Control Act; the records do, however, average between 5,000 and 10,000 pages in length.

2. *Permit issuance*.—It is too early to provide meaningful estimates of the average length of proceedings in the National Pollutant Discharge Elimination System program.

3. *Cancellation and suspension*.—Averages for disposal time and length of hearing record were not provided.

FOOD AND DRUG ADMINISTRATION

FDA had only four public hearings during fiscal years 1971-75. The transcripts averaged 1,158 pages.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Rulemaking and enforcement are NHTSA's two types of agency proceedings. With the publication of a notice of proposed rulemaking as the starting point, a range of about one month to one year is required for disposal of rulemaking proceedings. There are no hearing records in these proceedings. Time required for disposal of enforcement proceedings ranges from 3 to 4 months between initial and final agency determination. Transcripts are usually 50 to 100 pages in length.

APPENDIX A-9*

SANCTIONS¹ INVOKED BY THE REGULATORY AGENCIES, FISCAL YEARS 1971-75

CONSUMER PRODUCT SAFETY COMMISSION

Type of sanction	Fiscal year		
	1974 ²	1975	Total
Seizures.....	57	36	93
Injunctions.....	0	2	2
Administrative.....	2	48	50

¹ Criminal referrals not included.

² CPSC became operational May 14, 1973.

*Source: Replies to subcommittee questionnaire of June 1975 (question 96 to commissions and question 80 to single administrator agencies).

FEDERAL COMMUNICATIONS COMMISSION

Type of sanction	Fiscal year					Total
	1971	1972	1973	1974	1975	
Broadcast Bureau:						
Notice of accident (violation).....	94	89	97	118	212	607
Short-term license renewals.....	12	4	9	9	8	42
Hearings designated on renewal or revocation of broadcast licenses or construction permits....	28	21	13	23	15	101
Safety and Special Radio Services Bureau:						
Revocation proceeding initiated.....	354	456	421	559	740	2,510
Operator suspensions initiated.....	4	14	12	4	4	40
Fines levied.....	1,360	1,393	1,017	1,640	1,886	7,297
Cease-and-desist proceeding initiated.....	0	23	89	117	40	269

FEDERAL POWER COMMISSION

Type of sanction	Fiscal year					Total
	1971	1972	1973	1974	1975	
Federal Power Act, pt. I.....	8	8	5	15	6	42

FEDERAL TRADE COMMISSION

Type of sanction	Fiscal year					Total
	1971	1972	1973	1974	1975	
Consumer protection compliance cases.....	3	3	11	5	7	29
Competitive compliance cases.....	5	2	1	2	2	12
Enforcement of Commission orders to file reports.....	0	2	0	1	3	6

INTERSTATE COMMERCE COMMISSION

Type of sanction	Fiscal year					Total
	1971	1972	1973	1974	1975	
Civil forfeiture:						
Courts.....	91	24	10	16	4	85
Settlements.....	410	397	385	382	368	1,942
Civil sanctions initiated.....	61	52	57	73	98	341
Investigation proceedings leading to possible cease-and-desist orders.....	93	77	83	79	64	396

SECURITIES AND EXCHANGE COMMISSION

Type of sanction	Fiscal year					Total
	1971	1972	1973	1974	1975	
Injunctions ordered.....	114	113	145	143	165	680
Sanctions resulting from administrative proceedings:						
Revocation of registration:						
Broker-dealers.....	29	52	48	55	87	271
Investment advisers.....	3	3	5	0	0	11
Barred from association with a broker-dealer or investment advisory firm.....	94	100	85	155	213	647
Temporarily barred or suspended from association with a broker-dealer or investment advisory firm.....	132	178	98	127	124	659
Censure of broker-dealer or investment advisory firm or associated person.....	37	44	10	8	14	113
Denial of registration:						
Broker-dealer.....	2	1	0	1	1	5
Investment adviser.....	0	0	0	0	0	0
Trading suspensions.....	26	47	174	279	113	639
Disqualification, suspension, or censure imposed for improper professional conduct.....	1	7	25	14	19	66

ENVIRONMENTAL PROTECTION AGENCY

Type of sanction	Fiscal year					Total
	1971	1972	1973	1974	1975	
Air-mobile source enforcement:						
New sources:						
Sale of uncertified vehicles.....	0	0	0	3	1	4
Unauthorized maintenance.....	0	0	1	0	0	1
In-use sources:						
Tampering.....	0	0	1	5	2	9
Recalls.....	0	0	1	1	0	2
Imports: Illegal imports.....	0	0	0	1	0	1
Air-stationary source enforcement:						
SIP provisions of act: ¹						
Notice of violation.....	0	2	14	172	263	451
Administrative orders.....	0	1	7	57	147	212
Consent orders.....	0	0	0	10	68	78
Civil referrals.....	0	0	0	1	1	2
NESHA provisions of act: ¹ Administrative orders.....	0	0	1	15	19	35
Emergency episode provisions of act: ¹	0	1	0	0	0	1
Pesticides enforcement:						
Citations.....	1,036	1,159	1,360	80	0	3,635
Warnings for minor violations.....	552	650	823	583	847	3,455
Seizures.....	55	49	70	0	0	174
Stop sale, use, or removal orders.....	(²)	(²)	28	115	183	326
Civil penalty assessments.....	(²)	(²)	22	397	324	743
Civil penalty warning citations.....	(²)	(²)	0	0	37	37
Import detention.....	82	66	97	139	134	518
Water enforcement:						
FWPCA, ³ sec. 309:						
Administrative orders.....	0	0	0	165	748	913
Civil referrals.....	0	3	1	13	71	88
FWPCA, ³ sec. 311(b)(5): Oil spills.....	1	19	150	475	859	1,504
Refuse Act of 1899: Civil referrals.....	40	57	48	6	3	154
Ocean Dumping Act: Notices and violations issued.....	0	0	0	7	6	13

¹ Clean Air Act.² Not available.³ Federal Water Pollution Control Act.

FOOD AND DRUG ADMINISTRATION

Type of sanction	Fiscal year					Total
	1971	1972	1973	1974	1975	
Seizures.....	774	836	1,218	419	519	3,766
Injunctions.....	18	17	19	21	33	108
Recalls.....	1,900	740	1,153	881	948	5,622
Regulatory letters ¹	(²)	(²)	(²)	1,195	910	2,105

¹ Regulatory letters were not instituted until fiscal year 1974.

² Not available.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Type of sanction	Fiscal year					Total
	1971	1972	1973	1974	1975	
Injunctions.....	0	0	2	2	1	5
Civil penalties.....	15	20	42	44	34	155

APPENDIX A-10*

ABSENTEEISM OF COMMISSIONERS AT REGULARLY SCHEDULED MEETINGS,
FISCAL YEARS 1971-76

	Attendance by Commissioners			Absenteeism (percentage)
	Number of meetings	Scheduled (Number of Scheduled meetings) × (Number of Commissioners)	Actual	
Consumer Product Safety Commission ¹	174	837	751	10
Federal Communications Commission.....	378	2,555	2,286	11
Federal Power Commission.....	342	1,442	1,358	6
Federal Trade Commission.....	462	2,187	2,084	5
Interstate Commerce Commission ²	54	562	516	8
Securities and Exchange Commission.....	1,035	4,945	4,007	19
Total.....	2,445	12,528	11,002	12

¹ CPSC became operational on May 14, 1973.

² ICC rescheduled a large portion of its regular meetings as special conferences.

* Source: Replies to subcommittee questionnaire of June 1975 (question 22 to Commissions).

APPENDIX A-11*

TRAVEL BY COMMISSIONERS AND ADMINISTRATORS, FISCAL YEARS 1971-76

Sponsoring organization	CPSC		FCC		FPC		FTC		ICC		SEC		EPA		FDA		NHTSA	
	Num- ber of trips	Cost	Num- ber of trips	Cost	Num- ber of trips	Cost	Num- ber of trips	Cost	Num- ber of trips	Cost	Num- ber of trips	Cost	Num- ber of trips	Cost	Num- ber of trips	Cost	Num- ber of trips	Cost
Regulated industry	56	\$11,441	327	\$70,334	52	\$17,196	54	\$11,560	179	\$45,397	83	\$21,186	31	\$5,233	50	\$13,373	12	\$2,821
Consumer groups	9	1,533	5	1,501		338	19	2,958		3,363			24	3,818	1	270	4	1,749
Civic groups	3	8,222			3		56	12,779	10		134	34,627	20	4,016				
Professional groups	45		40	8,386	10	4,086												
Federal, State, and local government	12	2,517	9	2,352	23	5,936	13	3,538	22	6,285	3	1,109	22	7,155				
School groups	18	3,440	55	7,895	18	3,464	27	5,784	24	5,775	50	14,650	4	647	20	5,410	2	650
International and foreign government groups	3	3,610			7	8,490					4	4,391	1		21	11,953	16	16,711
Agency business	1	224			6	2,128			5	574	3	156	7	2,135	18	2,775		
Miscellaneous groups	13	2,038	125	21,605	11	2,607		2,640	5	932	27	5,135	33	5,072	10	1,536	1	183
Totals	160	133,292	570	114,259	130	34,245	189	341,957	386	100,085	304	81,264	142	28,106	121	35,815	46	23,365

* \$33,041 was borne by the Federal Government and \$251 by the sponsoring organizations.

† Total cost borne by the Federal Government.

‡ \$34,104 was borne by the Federal Government and \$141 by the Commissioners.

§ \$99,800 was borne by the Federal Government and \$285 by the Commissioners.

¶ \$54,159 was borne by the sponsoring organizations, \$19,853 by the Federal Government, and \$7,252 by the Commissioners.

‡ \$23,773 was borne by the Federal Government, \$5,894 by the sponsoring organizations, and \$148 by the Commissioners.

* Source: (1) Replies to Subcommittee questionnaire of June 1975 (question 73 to commissions and question 57 to single administrator agencies). (2) Updated information received from agencies in September 1976.

APPENDIX A-12*

RETENTION RATES FOR CAREER SERVICE PERSONNEL, FISCAL YEARS
1974-76

(In percentage)

Agency	GS-13 through GS-18	Grade Levels					
		GS-18	GS-17	GS-16	GS-15	GS-14	GS-13
Consumer Product Safety Commission.....	92	100	N/A	70	73	86	81
Federal Communications Commission.....	91	83	78	84	90	93	91
Federal Power Commission.....	90	75	71	83	90	93	90
Federal Trade Commission.....	82	65	62	82	87	86	82
Interstate Commerce Commission.....	89	83	90	82	91	92	89
Securities and Exchange Commission.....	90	80	94	89	89	94	89
Environmental Protection Agency.....	87	89	81	84	88	91	91
Food and Drug Administration ¹							
National Highway Traffic Safety Administration.....	94	73	87	94	95	94	93

¹ Records were not available at FDA for computing retention rates but the average length of HEW service for all FDA employees GS-13 and above is 11 yrs.

*Source: (1) Replies to subcommittee questionnaire of June 1975. (question 66 to commissions and question 51 to single administrator agencies). (2) Updated information received from agencies in September 1976.

APPENDIX B*

BIBLIOGRAPHY BY AGENCY OF GENERAL ACCOUNTING OFFICE REPORTS ON THE REGULATORY AGENCIES JULY 1, 1970-JULY 30, 1976

CONSUMER PRODUCT SAFETY COMMISSION

Need to Improve Enforcement of Standards Under the Flammable Fabrics Act, September 11, 1974.

Banning of Two Toys and Certain Aerosol Spray Adhesives, MWD-75-65, April 7, 1975.

Better Enforcement of Safety Requirements Needed by the Consumer Product Safety Commission, HRD-76-148, July 26, 1976.

FEDERAL COMMUNICATIONS COMMISSION

Fundamental Changes Needed to Achieve Effective Enforcement of Radio Communication Regulations, B-159895, November 3, 1972.

Financial Operations of the Radio Technical Commission for Marine Services, February 9, 1973.

Information on Management and Use of the Radio Frequency Spectrum—A Little-Understood Resource, B-159895, September 13, 1974.

GAO comments on the Federal Communications Commission procedure for collecting information from the public, OSP-76-19, May 7, 1976.

FEDERAL POWER COMMISSION

Propriety of Obligations, B-95136, August 31, 1972.

Activities Relative to Maintenance of Distribution Systems by Electric Utilities, B-176199, July 19, 1973.

Receipt and Coordination of Natural Gas Reserve Data by the Securities and Exchange Commission and the Federal Power Commission, B-178912, April 30, 1974.

Need for Improving the Regulation of the Natural Gas Industry and Management of Internal Operations, GGD-74-106, September 13, 1974.

Reliable Contract Sales Data Needed for Projecting Amounts of Natural Gas that could be Deregulated, RED-76-11, September 8, 1975.

Need to Evaluate the Effectiveness of the Natural Gas Curtailment Policy, RED-76-18, September 19, 1975.

Problems in Licensing Hydroelectric Projects, RED-76-13, September 23, 1975.

The Economic and Environmental Impact of Natural Gas Curtailments during Winter of 1975-76, RED-76-39, October 31, 1975.

*Source: Replies to Subcommittee questionnaire of June 1975 (question 42 to commissions and question 27 to single administrator agencies) and updated by Subcommittee staff.

Contract Award by the Federal Power Commission for Developing and Installing a Regulatory Information System, RED-76-59, April 2, 1976.

Actions Taken by the Federal Power Commission on Prior Recommendations Concerning Regulation of the Natural Gas Industry and Management of Internal Operations, RED-76-108, May 24, 1976.

FEDERAL TRADE COMMISSION

Advertisement Substantiation Program, B-147402, June 2, 1972.

Evaluation of the Federal Trade Commission's Proposed Annual Line of Business Report (Form CB), B-180229, May 13, 1974.

INTERSTATE COMMERCE COMMISSION

Analysis of the Comparative Domestic and Import Rates for Products Shipped by Rail, B-179218, April 4, 1974.

Alleged Discrimination and Concessions in the Allocation of Rail Cars to Shippers, B-114824, December 30, 1974.

Selected Views Related to Regulatory Reform in the Transportation Industry, OPA-76-13, January 13, 1976.

Better Information Needed in Railroad Abandonments, CED-76-125, July 23, 1976.

SECURITIES AND EXCHANGE COMMISSION

Review of Status of Appropriated Funds, May 11, 1971.

Waiver of Securities and Exchange Commission's Reporting Requirements, B-181217, May 29, 1974.

ENVIRONMENTAL PROTECTION AGENCY

Federally Assisted Air Pollution Control Programs in the Chicago Metropolitan Region, B-166506, April 20, 1971.

Review of Waste Water Discharges of Sugar and Potato Plants at Easton, Maine, B-165456, June 22, 1971.

Environmental and Economic Problems Associated with the Development of the Burns Waterway Harbor, Indiana, B-160199, September 20, 1971.

Federal Financial Assistance Provided to Lancaster, N.H. for Construction of Waste Treatment Facilities, B-166506, December 9, 1971.

Alternative to Secondary Sewage Treatment Offers Greater Improvements in Missouri River Water Quality, B-125042, January 6, 1972.

Water Pollution Abatement Program: Assessment of Federal and State Enforcement Efforts, B-166506, March 23, 1972.

Cleaner Engines For Cleaner Air: Progress and Problems in Reducing Air Pollution from Automobiles, B-166506, May 15, 1972.

Adequacy of the Motor Vehicle Certification Procedures, B-166506, June 12, 1972.

Need to Improve Administration of the Water Pollution Research, Development and Demonstration Program, B-166506, November 21, 1972.

History and Current Status of Allocation of Funds and Personnel Under the Clean Air Act and Solid Waste Disposal Act, B-166506, February 12, 1973.

Need to Control Discharges from Sewers Carrying Both Sewage and Storm Runoff, B-166506, March 28, 1973.

Environmental Protection Agency Efforts to Remove Hazardous Pesticides from the Channels of Trade, B-133192, April 26, 1973.

Federal and State Efforts to Control Water Pollution Caused by Acid Drainage From Mines, B-177011, August 14, 1973.

Assessment of Federal and State Enforcement Efforts to Control Air Pollution from Stationary Sources, B-166506, August 23, 1973.

Improved Federal and State Programs Needed to Insure the Purity and Safety of Drinking Water in the U.S., B-166506, November 15, 1973.

Research and Demonstration Programs to Achieve Water Quality Goals: What the Federal Government Needs to Do, B-166506, January 16, 1974.

Ban on DDT and its Emergency Use Against the Tussock Moth, B-125053, February 26, 1974.

Pesticides: Actions Needed to Protect the Consumer From Defective Products, B-133192, May 23, 1974.

Questions on the Safety of the Pesticide Maleic Hydrazide Used on Potatoes and Other Crops Have Not Been Answered, B-133192, October 23, 1974.

Implementation of Federal Water Pollution Control Act Amendments of 1972 is Slow, B-166506, December 20, 1974.

Using Solid Waste to Conserve Resources and to Create Energy, B-166506, February 27, 1975.

Cleaning Up the Great Lakes: United States and Canada are Making Progress in Controlling Pollution from Cities and Towns, B-166506, March 21, 1975.

Potential of Value Analysis for Reducing Waste Treatment Plant Costs, B-166506, May 8, 1975.

Control of Aircraft Noise and Air Pollution: Meetings Between FAA and the Public, RED-75-384, June 19, 1975.

Federal Pesticide Registration Program: Is it Protecting the Public and the Environment Adequately from Pesticide Hazards, RED-76-42, December 4, 1975.

Federal Programs for Research on the Effects of Air Pollution, RED-76-46, December 11, 1975.

Adequacy of Safety and Efficacy Data Provided by Nongovernmental Pesticide Laboratories, RED-76-63, January 26, 1976.

Implementing the National Water Pollution Control Permit Program: Progress and Problems, RED-76-60, February 9, 1976.

General Accounting Office Reviews of Federal Environmental Research and Development, RED-76-95, April 7, 1976.

Need for Better Management and Control over Scientific Equipment, RED-76-100, May 3, 1976.

Effects of New Environmental Protection Agency Regulations for Procuring Architect-Engineer Services on the Municipal Waste Treatment Construction Grant Program, RED-76-112, June 1, 1976.

Federal Efforts to Protect the Public From Cancer-Causing Chemicals Are Not Very Effective, MWD-76-59, June 16, 1976.

Better Federal Coordination Needed to Promote More Efficient Farm Irrigation, RED-76-116, June 22, 1976.

FOOD AND DRUG ADMINISTRATION

Investigation Use of Isoniazid—A Tuberculosis Control Drug, B-164031(2), October 7, 1971.

Fees Not Charged for Processing Applications for New Drugs, B-164031(2), November 4, 1971.

Total Diet Study in Other Pesticide and Other Residue Surveillance Programs, B-164031(2), February 23, 1972.

Dimensions of Insanitary Conditions in the Food Manufacturing Industry, B-164031(2), April 18, 1972.

An Incident of Contamination of Livestock Feed and Certain Consumer Products, B-164031(2), December 1, 1972.

Lack of Authority Limits Consumer Protection Problems In Identifying and Removing From the Market Products Which Violate the Law, B-164031(2), September 14, 1972. Processed Fruits and Vegetables: Potentially Adulterated Products Need to be Better Controlled—Sanitation in Some Plants Needs Improvement, B-164031, February 21, 1973.

Problems in Obtaining and Enforcing Compliance With Good Manufacturing Practices for Drugs, B-164031(2), March 29, 1973.

Protecting the Consumer From Potentially Harmful Shellfish (Clams, Mussels, and Oysters), B-164031(2), March 29, 1973.

Implementation of the Poison Prevention Packaging Act of 1970, B-164031(2), May 1973.

Supervision Over Investigational Use of Selected Drugs, B-164031 July 23, 1973.

Assessment of the Food and Drug Administration's Handling of Reports on Adverse Reactions From the Use of Drugs, B-164031(2), March 7, 1974.

Approval of Term "Potato Chips" for Products Made from Dried or Dehydrated Potatoes, B-179195, March 21, 1974.

Salmonella in Raw Meat and Poultry: An Assessment of the Problem, B-164031(2), July 22, 1974.

Activities Involving Sanitation Conditions At Food Storage Warehouses, July 30, 1974.

Extending Effective Date of the Food and Drug Administration's Diagnostic X-Ray Equipment Standard, B-164031(2), September 23, 1974.

Food Labeling: Goals, Shortcomings, and Proposed Changes, MWD-75-19, January 29, 1975.

Excluding Substandard Canned Pineapple From the United States, MWD-75-40, March 3, 1975.

Food and Drug Administration's Investigations of Defective Cardiac Pacemakers Recalled by the General Electric Company, MWD-75-71, March 10, 1975.

Public Hazards From Unsatisfactory Medical Diagnostic Products, MWD-75-52, April 30, 1975.

Need for Regulating the Food Salvage Industry to Prevent Sales of Unwholesome and Misbranded Foods to the Public, MWD-75-64, May 20, 1975.

Need to Establish the Safety of Color Additive, Additive FC&C RED No. 2, MWD-76-40, October 20, 1975.

Federal Support for Restaurant Sanitation Found Largely Ineffective, MWD-76-43, December 8, 1975.

A Financial Disclosure System for Employees Needs Tightening, FPCD-76-21, January 19, 1976.

Duplication in Federal Food Inspection Activities, January 28, 1976.

Use of Cancer-Causing Drugs in Food-Producing Animals May Pose Public Health Hazards: The Case of Nitrofurans, MWD-76-65, February 25, 1976.

More Effective Action Needed to Control Abuse and Diversion in Methadone Treatment Programs, GGD-76-51, March 9, 1976.

Recalls of Large Volume Parenterals (Liquid Drugs Administered Intravenously or by other Normal Means), MWD-76-67, March 12, 1976.

Regulation of the Food Additive Aspartame, MWD-76-111, April 8, 1976.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Services Performed for the Third International Technical Conference on Experimental Safety Vehicles, B-177054, January 15, 1973.

More Effective Efforts Needed to Insure Compliance with Federal Safety Standards, B-164497(3), April 24, 1973.

Policy of Forcing States to Require that Motorcyclists Use Helmets, B-1649497(3), April 24, 1973.

Need to Improve Benefit-Cost Analyses in Setting Motor Vehicle Safety Standards, RED-74-251, July 22, 1974.

Improvements Needed in Planning and Using Motor Vehicle Safety Research, RED-75-265, September 16, 1974.

The Auto Safety Program: Identifying Defects and Recalling Defective Vehicles, RED-75-324, February 11, 1975.

Delays in Establishing Uniform Quality Grading System for Motor Vehicle Tires, RED-75-344, March 28, 1975.

Effectiveness, Benefits, and Costs of Federal Safety Standards for Protection of Passenger Car Occupants, SED-76-121, July 7, 1976.

APPENDIX C

PROPOSED REQUIREMENTS FOR AGENCY "COMPLIANCE REPORT" TO BE INCORPORATED INTO EACH AGENCY'S ANNUAL REPORT

This report's recommendations for improving congressional oversight include the following proposal:¹

The Congress should institute across-the-board reform of annual reports prepared by Federal regulatory agencies. Specifically, each agency should be required to indicate in its annual report the precise extent of compliance with applicable laws. Agencies should indicate, for example, whether statutory deadlines for initiating programs, issuing regulations, and publishing reports have been met.

In addition, each agency should include a detailed breakdown of the extent to which regulated industry is in compliance with current agency regulations.²

The following is a proposed checklist for annual compliance reports to the Congress from the agencies addressing industry compliance with agency regulation, to be incorporated into each agency's annual report:

(1) A statement of the laws under which the agency enforces regulatory programs governing private conduct, the programs established to implement these laws, the governing regulations, and the resources (dollars, manpower) devoted to each, specifying under each the portion devoted to enforcement.

(2) A statement of the size and nature of the universe subject to compliance requirements (for example, auto manufacturers, parts manufacturers, dealers, etc.).

(3) A statement of the sanctions or remedies—including seizure, recall, repair, fines, etc., available to the agency, under each regulatory program listed under 2 above.

(4) For the period covered by the report, a statement of each type of enforcement activity used by the agency—investigations pursued, warning letters, referrals to the Justice Department, etc., and the frequency of use of each one. List public investigations; show number of non-public investigations.

(5) For agencies except the Securities and Exchange Commission and the Federal Trade Commission:

(a) For the period covered by the report, a list company-by-company of each violation found, the corrective action required, the actions taken for correction, the fine imposed, and notice to the public.

¹ Chapter 17, p. 546.

² "Compliance" for purposes of this report means adherence by regulated companies to the requirements of the agency's regulatory programs. These requirements might be specified in a number of ways, including rules issued by the agency, "common law" developed in agency adjudicative and licensing proceedings, judicial decisions, and statutes. For example, compliance information would show how much of the bus industry was in compliance with NHTSA's safety regulations in the last fiscal year, or how many plant locations were within existing EPA effluent guideline limitations. "Enforcement" for purposes of this report means the detection of specific violations of the requirements of the agency's regulatory programs and the sanctions applied to those violations. In short, enforcement activities of the agency are directed at assuring compliance by regulated industry.

(b) For each proceeding completed during the fiscal year, the sanction invoked (e.g., recalls, repair, license revocation, cease and desist order, civil or criminal action or referral).

(c) The total dollar amount of all fines and penalties levied during the fiscal year as well as the median dollar amount of all fines and penalties.

(d) A listing of resolutions (i.e., negotiated settlements such as consent decrees) reached.

(e) An indication of how the agency monitors these agreements, the number and identity of respondents which were not in compliance with the terms of these agreements during FY 1975, and the nature of the violations. The Federal Trade Commission and the Securities and Exchange Commission, which have enforcement jurisdiction over the largest number of individuals and businesses would be permitted to submit summary data.

(6) The following table:

Case (enforcement proceeding) activity for year

Cases pending at beginning of year	-----	-----
Less cases on which agency action is completed:		
(a) By agreement (i.e., negotiated settlements such as consent decrees)	-----	-----
(b) Referred to Justice or other department	-----	-----
(c) By commission decision	-----	-----
(d) As result of findings of investigations	-----	-----
(e) Other (specify)	-----	-----
Total of a, b, c, d, e	-----	-----
Plus cases started	-----	-----
Cases pending at end of fiscal year	-----	-----

(7) A statement of additional resources, including facilities, needed to improve enforcement activities.

(8) A list of hindrances faced in carrying out enforcement activities, including refusals by companies to supply data, the need for change in legislative authority, stronger support from the Justice Department for the imposition of penalties, (including criminal penalties), and the need for greater autonomy in deciding how to carry out enforcement activities.

(9) If testing is performed in which sampling techniques are employed, for compliance purposes, a statement of how the sample is selected and, based on the total violations found from the sample, a projection of the estimated number of violations by regulated companies. (Sampling is not considered appropriate as any part of a standard which sets a substantive level of product performance.)

(10) A statement of the priorities for future enforcement activities and how they are determined.

(11) For the period covered by the report, a statement of the cost in dollars to citizens and the economy of violations discovered, including casualties and property damage.

APPENDIX D

FUNDING PUBLIC PARTICIPATION: OPINION OF THE COMPTROLLER GENERAL OF THE UNITED STATES, MAY 10, 1976

Appendix D-1

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., April 22, 1976.

HON. ELMER B. STAATS,
Comptroller General of the United States,
Washington, D.C.

DEAR ELMER: As you know, this Subcommittee is engaged in a comprehensive study of federal regulation. We are studying nine agencies: the Federal Communications Commission, the Federal Trade Commission, the Federal Power Commission, the Interstate Commerce Commission, the Consumer Product Safety Commission, the Securities and Exchange Commission, the Food and Drug Administration, the Environmental Protection Agency, and the National Highway Traffic Safety Administration. One of our primary concerns is whether in the present agency decisionmaking process a variety of points of view is effectively articulated, for we believe that regulatory agencies must be made aware of the many sides to each issue which comes before them in order to make sound determinations of where the public interest lies.

Some students of the regulatory process have suggested that agencies might obtain a greater variety of views on which to base their decision-making if they were to make available funding which would defray the cost of participation by groups which are financially unable effectively to participate in agency proceedings. In a letter dated February 19, 1976, the Deputy Comptroller General advised the Nuclear Regulatory Commission that it has authority, in the exercise of its discretion, to compensate those members of the public who cannot afford to pay for the costs of participation in Commission proceedings:

NRC has the statutory authority to facilitate public participation in its proceedings by using its own funds to reimburse intervenors when (1) it believes that such participation is required by statute or necessary to represent adequately opposing points of view on a matter, and (2) when it finds that the intervenor is indigent or otherwise unable to bear the financial cost of participation in the proceedings.

In reaching this conclusion, the decision rejected the argument that Congress' inclusion in the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of a provision explicitly authorizing

compensation to public participants implicitly bars any agency having no such specific authorization from providing compensation. The decision also found three recent judicial decisions, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); *Turner v. Federal Communications Commission*, 514 F. 2d 1354 (D.C. Cir. 1975); and *Greene County Planning Bd. v. Federal Power Commission*, 455 F. 2d 412 (2d Cir. 1972), irrelevant to the question of whether the NRC has authority to reimburse public participants for their expenses.

With regard to other methods of assisting public participants, the decision further held that the NRC has authority to modify its procedural requirements in such a way as to reduce the cost of participation in its proceedings. It held that the Commission does not have authority, however, to provide technical expertise to participants through access to agency staff nor to finance independent entities not within its jurisdiction and control where the purpose of those entities is to assist adversary participants in NRC proceedings.

Please advise the Subcommittee whether, with respect to each of the nine agencies we are studying, authority now exists for assisting public participants in any or all of the following ways: (1) the provision of funds directly to participants, (2) modification of procedural rules so as to ease their financial burden on public participants, (3) provision of technical assistance by agency staff, (4) provision of legal assistance by agency staff, (5) creation of an independent public counsel, and (6) creation of a Consumer Assistance Office such as that now employed by the FCC.

We would appreciate your response by May 3, 1976.

Sincerely,

JOHN E. MOSS,

Chairman, Oversight and Investigations Subcommittee.

Appendix D-2

COMPTROLLER GENERAL OF THE UNITED STATES,

Washington, D.C., May 10, 1976.

Hon. JOHN E. MOSS,

Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This refers to your letter in which you request the advice of this Office, with respect to nine agencies of the Government under study by the Subcommittee on Oversight and Investigations, as to whether public participants in proceedings before those agencies may be assisted in any or all of the following ways:

"(1) the provision of funds directly to participants, (2) modification of procedural rules so as to ease their financial burden on public participants, (3) provision of technical assistance by agency staff, (4) provision of legal assistance by agency staff, (5) creation of an independent public counsel, and (6) creation of a Consumer Assistance Office such as that now employed by the FCC."

The agencies to which you refer are the Federal Communications Commission, the Federal Trade Commission, the Federal Power Commission, the Interstate Commerce Commission, the Consumer Product Safety Commission, the Securities and Exchange Commission, the Food and Drug Administration, the Environmental Protection Agency, and the National Highway Traffic Safety Administration.

Your letter refers to our decision in the Matter of Costs of Intervention, Nuclear Regulatory Commission (NRC), B-92288, February 19, 1976, to the NRC (hereafter referred to as the NRC decision) in which we considered the legality of providing similar types of assistance to participants and intervenors in NRC rulemaking and licensing proceedings.

Due to the time constraints established by the terms of your request, we have not solicited comments and views of the agencies concerned on the questions your letter poses. However, we have examined, with respect to each agency, some of the statutory and/or regulatory authorities which authorize or direct that public hearings be held for a variety of purposes related to accomplishment of the agency mission. We find that each agency has authority to request participation by members of the general public in its proceedings, either as parties or intervenors, although there are individual differences in the extent to which such participation would be likely to be required.

Finally, we could discover no statutory prohibition against the provision of any of the types of assistance about which you have inquired.

We thus conclude that there is no significant difference in the relevant authorities for the nine agencies you named and in those of the NRC. Accordingly, the rationale of our February 19 decision to NRC is equally applicable to each agency named.

1. *Provision of funds directly to participants.*—With respect to your first question, appropriated funds of each agency may be used to finance the costs of participants in agency hearings whenever the agency finds that it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation. It should be noted that the Federal Trade Commission (FTC) has specific statutory authority, provided by section 202(a) of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183, approved January 4, 1975, to provide compensation for expenses of participation for persons appearing before it. This provision is discussed on pages 4 and 5 of our aforementioned decision.

We would like to emphasize, however, that it is within the discretion of each individual agency to determine whether the participation of the particular party involved is necessary in order for it to properly carry out its functions and whether the party is indigent or otherwise unable to finance its participation. No party has a right to intervene at Federal expense unless the agency so determines.

Finally, for the reasons set forth in the NRC decision, we believe it would be advisable for the parameters of such financial assistance, and the scope and limitations on the use of appropriated funds for this purpose to be fully set forth by the Congress in legislation, as

was done in the case of the Federal Trade Commission by the provisions of section 202(a) of the "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act," *supra*.

2. *Modification of procedural rules so as to ease their financial burdens on public participants.*—For the reasons stated with respect to NRC in the NRC decision, we find nothing in the laws of any of the agencies considered to prevent simplification of procedures and the elimination of unduly burdensome requirements which increase the cost of participation by parties involved.

3. *Provision of technical assistance by agency staff.*—For the same reasons given under "Access to Technical Information and Staff" in the NRC decision with respect to NRC, the same access to technical expertise may be made available by each agency. As we stated with respect to NRC, this would not extend to the assignment of agency staff members to participants in the role of individual technical advisors for the purpose of advancing the position of a particular party.

4. *Provision of legal assistance by agency staff.*—To the extent a participant needs factual information concerning legal aspects of a proceeding, such as explanations of procedures or examples of documents required to be filed, we believe agency staff members can provide this. However, agency staff could not be permitted to act in the capacity of advocates for a participant.

5. *Creation of an independent public counsel.*—We believe nothing precludes an agency from having its staff present information to the agency's decisionmaking bodies concerning the public interest or consumer viewpoints in the course of a proceeding in order to call attention to relevant opinions not expressed by parties representing private interests. However, no agency could use its appropriations to establish an independent entity outside its jurisdiction and control.

6. *Creation of a Consumer Assistance Office such as that now employed by the FCC.*—On March 19, 1976, the Federal Communications Commission (FCC) announced the formation of a new Consumer Assistance Office. According to a press release from FCC:

"This office will provide a central location or coordinating point within the Commission for members of the public, citizens groups and FCC licensees who seek information or assistance.

* * * * *

"The Consumer Assistance Office represents another step in the FCC's efforts to ensure prompt and accurate response to inquiries and to enhance public understanding of the Commission's policies and regulations.

* * * * *

"Any person or group wishing information about the Commission's rules, matters pending or material explaining FCC policies and regulations may contact one of the fulltime staff members of the Office.

"The Office also will provide information assistance to persons who wish to participate in the Commission's processes or file an application with the FCC but who are unfamiliar with the procedures to be followed.

"Finally, the Office will help prepare attractive and easy to understand brochures explaining Commission regulations and how best to comply with them."

We have been informally advised by staff of the FCC that this Office is not in any way intended to act as an advocate for consumers. It does not include in its staff attorneys or professional experts in other fields. Its function is, basically, that of providing the public with factual information. We are not aware of anything which would preclude any of the agencies named in your letter from establishing a similar office.

We might also point out that our NRC decision would also be applicable to agencies other than the ones mentioned in your letter, assuming that there was no specific legislative prohibition against it, provided that the particular agency holds hearings at which it has the discretion as to whom to admit as participants or intervenors; has appropriations available to pay for "necessary expenses" to carry out the missions for which the hearings are being held; and makes the determinations mentioned in the immediately preceeding paragraph. This is also true of the other types of assistance mentioned herein.

Sincerely yours,

R. F. KELLER,
Deputy Comptroller General of the United States.

APPENDIX E

AGENCY POLICIES REGARDING PAYMENT OF TRAVEL EXPENSES AND DISCLOSURE OF FINANCIAL HOLDINGS

Commissioners and their top staff occasionally accept travel expenses from organizations which have asked them to attend a meeting or to deliver a speech. In some instances the arrangement may create the appearance of improper influence.

Another potential conflict of interest arises from personal investments. An assessment of a report of the General Accounting Office concerning the financial disclosure system for employees of the Food and Drug Administration confirms a need to improve the agency's system of disclosing employees' finances to assure that conflict-of-interest and potential conflict-of-interest situations will not develop.

A basic purpose of "conflict of interest" regulations applied to employees by regulatory agencies is to insure that their activities are conducted without even the appearance of improper influence.¹

1. PAYMENT OF LODGING AND TRAVEL COSTS BY INDUSTRY AND OTHER OUTSIDE GROUPS

The Subcommittee's June 1975 questionnaires requested each of the nine regulatory agencies under study to identify the specific occasions in the last 5 fiscal years when any commissioner, administrator, or employee at the GS-15 grade equivalent or above appeared as an invited speaker, panel member, or guest before industry and professional organizations, conventions, or State and local regulatory bodies or meetings to discuss Federal regulatory policies and practices. Among other things, we asked whether the cost of attendance at the functions was borne by the Federal government or the host.

The nine agencies varied widely in their practices. The following schedule² shows the regulatory agencies which had commissioners or administrators whose travel expenses were paid for by the host.

Agency	Trips	Cost borne by—			Total costs of trips
		Federal Government	Sponsoring organization	Commissioners	
SEC.....	252	\$9,139	\$52,178	\$6,041	\$67,358
FDA.....	106	24,310	5,231	148	29,689
CPSC.....	142	29,839	251	30,090

¹ See Interstate Commerce Commission General Rules and Regulations, 49 C.F.R. Section 1000.735-12 and 49 C.F.R. Section 1000.735-13; Federal Communications Commission 47 C.F.R. Section 19.735-204; Federal Power Commission Standard of Conduct 18 C.F.R. Section 3.735; and Civil Aeronautics Board Employee Responsibilities and Conduct 14 C.F.R. Section 370.357-71.

² Based on data furnished by the nine regulatory agencies in response to Subcommittee's questionnaires of June 1975.

In addition, senior staff (GS-15 through 18) of five of these regulatory agencies also accepted invitations to speak before various organizations, which paid \$155,637 towards the cost of making these trips. Travel costs by the SEC senior staff, \$146,000, accounted for most of this total. The other four agencies for which sponsoring organizations paid for some travel costs were FDA, FPC, EPA, and CPSC.³

Regulatory agency employees at salaries below the GS-15 level also travel as non-paying guests of sponsoring organizations. In a May 4, 1976 letter to Subcommittee Chairman Moss, the Administrator of the Food and Drug Administration pointed out that in 1975 the agency received \$61,160 from non-Federal sources for transportation, lodging, and subsistence expenses of its employees on official agency business. Of this amount, \$42,085 came from foreign governments or national/international health organizations; \$7,188 was paid by colleges and universities; and \$11,887 came from other sources, including professional and trade associations. In total, payment from non-Federal sources was accepted in connection with 109 different trips by 97 FDA employees, including the Commissioner and Deputy Commissioner.

Chairman Hills of the SEC, during hearings⁴ before the Subcommittee on May 20, 1976, acknowledged that the acceptance of payment for commissioners' travel costs from outside sources did create the appearance of a possible conflict of interest. He went on to state that commissioners of the SEC would not again travel at the expense of the sponsoring organization.

2. DEFICIENCIES IN THE FINANCIAL DISCLOSURE SYSTEM FOR FOOD AND DRUG ADMINISTRATION EMPLOYEES

Regulatory agency rules concerning the ownership of financial interests also vary widely. The Interstate Commerce Commission, the Federal Communications Commission, the Federal Power Commission, and the Civil Aeronautics Board prohibit all of their employees from owning interests in companies they regulate.⁵ Department of Health, Education, and Welfare regulations (45 C.F.R. section 75a.735-502) governing the Food and Drug Administration, on the other hand, provide that:

Employees engaged in regulatory activities shall not have a financial interest in any company whose business activities are regulated by FDA unless the regulated activities of the company are an insignificant part of its total business operations.

FDA interprets this regulation as requiring that employees may not have an interest in any organization whose FDA-regulated products constitute more than 10 percent of the organization's annual gross sales.

FDA, in its supplemental regulations, places the following strictures on financial interests of employees who are not required to file statements of disclosure.⁶ Such employees may have a financial in-

³ FDA total \$4,839, FPC \$2,969, EPA \$1,275, and CPSC \$410.

⁴ Hearing on Regulatory Reform and Oversight of the Securities and Exchange Commission before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d sess., Vol. V at 535-38.

⁵ *Supra* note 51.

⁶ Employees who have non-regulatory duties.

interest in a significantly-regulated organization provided (1) the holding is less than \$5,000 (value or cost at time of initial reporting); (2) the holding represents less than 1 percent of the organization's total outstanding stock shares; and (3) no more than 50 percent of the employee's total investment value is concentrated in significantly regulated industries.

Since these employees need not file financial statements, they are, according to the FDA, on the honor system.

Instructed by Chairman Moss to study the system of financial disclosure by employees of the Food and Drug Administration, the staff of the Subcommittee analyzed the report of the General Accounting Office (GAO) of January 19, 1976,⁷ reviewed FDA comments on the GAO Report, and independently assessed financial disclosure statements filed by more than 90 FDA employees.

The staff found that FDA was haphazard in insuring that employees were adhering to its financial disclosure regulation. A study of employee records indicates that the agency paid intensive attention to this subject only after inquiries were made by the GAO and by the Subcommittee. As a result, FDA brought enforcement of its own regulations up-to-date almost entirely during the first 3 months of 1976.

Substantively, no evidence was found that employees were actively buying or selling common stocks on the basis of information obtained on the job. However, at least 60 employees held interests prohibited by FDA; at least 14 employees were holding prohibited interests that were overlooked by FDA; and at least 6 employees disclosed prohibited holdings in 1973 and again in 1974. The potential for serious abuse in the present regulations is that they do permit the holding of financial interests by employees who are in a position to apply confidential information or official influence to their personal profit.

Applying its own regulations, FDA found that a total of 134 FDA employees held prohibited financial interests as of June 30, 1974. FDA determined that 60 held interests directly related to their responsibilities; 70 held interests indirectly related; and 4 held interests in both. GAO, in reviewing these financial statements, generally concurred with the FDA findings.

The GAO review found that 25 employees owned an additional 27 prohibited interests which were overlooked by FDA reviewers.

In addition, GAO found that: (1) 203 regulatory employees had not filed required financial disclosure statements; (2) FDA had not developed a policy on real estate holdings (about 50 employees owned farm property which had not been reviewed sufficiently to discover possibilities of a real or potential conflict); and (3) the General Counsel, Department of Health, Education, and Welfare, had not acted promptly on several requests for exception referred there by FDA for review and consideration.

Based on its review, GAO recommended that the HEW Secretary direct the FDA Commissioner to: (1) develop effective procedures for collecting employee statements; (2) insure that all employee state-

⁷ *Financial Disclosure System for Employees at the Food and Drug Administration Needs Tightening*, Report to the Congress, January 19, 1976, FPCD-76-21.

ments are reviewed within 60 days after they are filed; (3) develop policies concerning employee property interests; (4) develop procedures to insure certification of the review of the statements; (5) develop procedures to insure prompt action on divestiture requests and on failures to comply with the regulations; and (6) provide guidelines to help employees determine whether they may retain or acquire a particular financial interest.

FDA Commissioner Schmidt contended in a March 8, 1976, memorandum to Subcommittee Chairman Moss that most of these prohibited interests would not be a "matter of concern" if FDA's regulations were similar to those of most other regulatory agencies, which establish separate categories of prohibitions for individual components of the organization, impose disclosure requirements only on employees directly engaged in regulatory duties, do not prohibit interest in firms with remote or inconsequential involvement in regulated areas, and permit holdings of less than \$5,000, regarded as insignificant.

The FDA stated that its purpose was to assure that employees conduct its business effectively, objectively, and without improper influence, either in actuality or in appearance.

In its own regulations, FDA concedes that:

"Because of FDA's special regulatory responsibilities to the consumer and industry, its employees must be especially alert to avoid any real or appearance of conflict of their private interests with their public duties. Their actions must be unquestionable and free from suspicion of partiality, favoritism, or any hint of conflicting interests. This supplement recognizes FDA's public obligation to set reasonable and fair safeguards for the prevention of employee conflicts of interests. It is necessary to meet FDA's regulatory responsibilities and to otherwise assure full protection of the public confidence in the integrity of its employees."⁸

FDA's staff concluded that certain holdings by the FDA employees were prohibited by its regulations, because ownership presents an appearance of a conflict-of-interest.

Moreover, FDA contended that "97 percent of the reported interests would not even be discernible if GAO had applied the financial disclosure criteria used by most other Federal agencies." A staff analysis of the regulations of other agencies finds that the Interstate Commerce Commission, the Federal Communications Commission, the Federal Power Commission, and the Civil Aeronautics Board prohibit *all* of their employees from owning any financial interest in the companies they regulate.⁹

3. CONCLUSIONS

The continuing practice of the acceptance by regulatory agency employees of travel expenses from industry groups, trade associations, professional groups, and other similar organizations gives the appearance of a conflict-of-interest. Each regulatory agency should review and revise its travel regulations to indicate clearly that acceptance of such payments is prohibited.

⁸ 45 C.F.R. Section 73a.735-101(a).

⁹ *Supra* note 1.

Because of the importance of FDA's responsibilities, its financial interest regulations should be strengthened to include, at a minimum, a total prohibition on ownership by regulatory employees of any securities in industries directly subject to FDA regulation. Such a blanket prohibition with regard to certain securities would help insure the integrity of FDA decisionmaking and would facilitate enforcement of the disclosure regulations by eliminating borderline cases (e.g., firms with sales 8-10% regulated by FDA). Although such a restriction would prohibit holdings of modest size, the FDA responsibilities are of such importance to public health and safety that its rules prohibiting employees from having financial interests in regulated industry should be strict.

APPENDIX F

THE SUBCOMMITTEE'S QUESTIONNAIRES OF JUNE 1975

Appendix F-1

QUESTIONNAIRE FOR REGULATORY COMMISSIONS

Interstate Commerce Commission, Federal Trade Commission, Federal Power Commission, Federal Communications Commission, Securities and Exchange Commission, and Consumer Product Safety Commission.

June 1975

I. History and Goals

1. Furnish a brief history of the Commission, including specific references to organic acts and amendments. Highlight major events which have changed the Commission's interpretation of its original mandate.

2. List the statutes administered by the Commission as of June 1, 1975.

3. Describe the regulated industry(ies) as of December 31, 1960; December 31, 1965; December 31, 1970; and December 31, 1974, in terms of—

(a) number of companies;

(b) volume of business in terms of goods or services produced;

(c) number of industry employees;

(d) value of plant facilities, or firms;

(e) profit levels: industry average and 10 largest individual companies; and

(f) concentration levels: largest four and largest eight firms.

4. Supply copies of any "Goals," i.e. policy objectives statements, issued by the Commission in the last five fiscal years.

5. How, in the past five fiscal years, has your Commission translated its basic policy into significant rulings, regulations, or programs? Give those examples you believe best illustrate such effect.

6. List and supply copies of all annual and other periodic or special reports required by statute or Executive Order to be submitted to the Congress or any of its Committees in the last five fiscal years.

7. List and supply copies of any required annual or other reports to the President (if different from the annual or periodic reports to the Congress) in the last five fiscal years.

8. Identify any Congressional hearings (other than the annual appropriations hearings), during the last five fiscal years, at which personnel from your Commission have appeared as witnesses; the general nature of the subject matter of those hearings; and the names and titles of those individuals in your Commission who participated in those hearings.

II. Members, Meetings, and Staff

A. SERVICE

9. Show the periods of service (and median service periods) for the Chairman, Vice-chairman, and each of the commissioners serving on your Commission on January 1, 1971, or appointed to the Commission after that date.

10. Identify any periods, since January 1, 1971, during which the Commission did not have its total authorized number of commissioners appointed.

11. During the same time period, which of your commissioners served beyond his term of appointment, and when did this occur? What was the period of time in which he served in this temporary capacity? Was he subsequently reappointed as a commissioner?

B. PRIOR AND SUBSEQUENT EMPLOYMENT

12. Which commissioners, in the past five fiscal years, have come to your Commission, directly or indirectly, from employment in or compensation by the industry regulated by or subject to your jurisdiction? Which of the Commission's employees, GS-15 equivalent or higher, have come from such employment, directly or indirectly? Where indirectly, explain the circumstances. Employment includes, throughout, legal representation of a firm, or consultant under contract to a firm, in such regulated industry.

13. Which commissioners, on leaving the Commission, have directly or indirectly accepted employment or compensation in the industry regulated by or subject to your jurisdiction, within five years after termination of their Commission service? Itemize and specify.

14. Does your Commission maintain records of employment taken by separating GS-15 equivalent or higher grade personnel for the period: (a) immediately following such separation; and (b) for a period of at least five years following such separation?

15. If so, identify personnel from your Commission, formerly at GS-15 level or higher, who have taken employment in the industry regulated by or subject to your jurisdiction.

16. What statutory or other constraints, if any, are currently imposed on former commissioners and GS-15 equivalent or higher grade personnel in terms of their—

(a) representing companies regulated by your Commission, at informal or formal hearings?

(b) appearing as representatives of citizens' groups and public interest groups?

(c) appearing as independent, expert witnesses?

17. What periodic checks do you make to insure that your requirements are adhered to?

C. COMMISSION MEETINGS

18. What are the Commission's procedures for giving advance notification to the public of regular and special Commission meetings?

19. Do informal meetings with other agencies or industry groups occur? How often? Furnish examples. What record of such meetings and the subjects discussed is maintained? Is the public notified, and if so, how? Is this before or after such meetings?

20. Furnish two copies of your regulations pertaining to proxy voting. If you have no such regulations, or they are silent on the matter of proxy voting, furnish a statement of your Commission's current *practices*. What is the duration of these practices? How do you monitor the regulations or practices? Describe.

21. With reference to proxy voting—

(a) Do commissioners assign their voting proxies to non-commissioners (i.e., staff members)?

(b) Do commissioners assign their voting proxies to other commissioners by turning over blank, signed proxies?

(c) What procedure exists for ratification of the proxy vote after its exercise?

(d) What steps are taken to preserve Commission votes, when proxy ballots are cast?

(e) To what extent do these procedures differ from procedures that pertain when no proxy ballots are cast?

(f) Upon what legal authority does the Commission rely for proxies?

22. Complete the following schedule from records of the Commission's regularly scheduled meetings for each fiscal year from 1971 through 1975:

Meeting dates	Number of Commissioners physically attending	Formal voting occurred		Number of Commissioners voting	
		Yes	No	Personally	By proxy
1.					
2.					
3.					
4.					
5.					
Et cetera.					

23. Prepare a similar schedule for any *special* meetings of the Commission called by the Chairman, showing, in addition, the purpose of that meeting.

24. Of the total number of meetings reported above, how many regular meetings were held in closed session? How many of the special meetings?

25. What are the Commission's official policies on the subject of holding closed meetings?

26. Is a calendar or agenda published in advance of all meetings? Furnished copies of the documents for the 10 most recent regular and special meetings.

27. Are official minutes taken during both regular and special meetings? Furnish a copy of the governing regulations. How soon after the meeting is held are official minutes prepared and approved?

28. Are all intermediate and final Commission decisions and opinions indexed and published? If not, furnish a copy of the instruction or directive setting out the criteria to be applied in determining which decisions and opinions are *not* to be indexed or published.

29. Are there instances when member dissents to Commission proceedings are not published? If so, explain the circumstances, including statutory basis for barring publication of dissenting views.

III. Commission Procedures and Operations

A. PROCESS AND ORGANIZATION

30. Identify important current regulatory *process* problems, such as delays, excessive length of hearing records, costs of creating hearing records, backlogs, number of "intervenor," judicial reversal of Commission decisions, or other problems. Attach copies of all significant court decisions reversing decisions of your Commission.

31. Summarize from operating and statistical data, for each of the past five fiscal years—

(a) the time required for disposal of the average agency proceeding in the various categories of proceedings handled; (agency proceeding in this questionnaire is as defined in the Administrative Procedure Act.)

(b) the approximate average length of hearing records in such proceedings.

32. Describe those internal changes or reforms accomplished or attempted by the Commission during fiscal years 1971 through 1975 to improve operating efficiency.

33. List complaints and recommendations concerning administrative procedures of the Commission received during fiscal year 1974 and 1975 from—

(a) the industry or industries regulated by or subject to the jurisdiction of the Commission;

(b) individuals, private citizens' groups and public interest groups; and

(c) governmental agencies or bodies, at the national or state level.

34. Describe how complaint letters are organized and indexed, and describe the way these letters are utilized in the regulatory process. Is the public given access to these letters?

35. By major category, list the oldest 20 agency proceedings currently before your Commission, by date, subject matter, and petitioner or affected party. Describe current status.

36. Supply a copy of the Commission's current organization chart showing the major operating and staff elements (e.g., bureaus, divisions, offices), together with the December 31, 1974 staffing levels for each of those organizational elements. Furnish two copies of your most current telephone directory.

37. Furnish copies of those directive documents setting forth the criteria for staff resource allocations to the major organizational elements.

B. PLANNING AND EVALUATION

38. Identify the major internal groups performing audits, personnel evaluations, compliance inspections, and/or program evaluation reviews, together with a list showing the reports issued by each group, the subject matter areas examined, and responsive corrective actions taken during fiscal years 1970 through 1975.

39. Identify the organizational elements in your Commission having responsibility for long-range policy planning as of December 31, 1974.

40. List recommendations of these policy-planning elements adopted by the Commission since December 31, 1971.

41. Describe how those elements currently report to the chairman, commissioners, the Commission's principal executive officers, and the Commission's principal budget officers.

42. What General Accounting Office recommendations have been made to the Commission following audits performed since January 1, 1971, and what action has been taken thereon by the Commission? Specify.

43. How does the Commission attempt to measure its effectiveness and the efficiency of its operations, in terms of—

(a) quality and level of service (or product) provided by the industry regulated?

(b) reasonableness of the cost of that service or product?

(c) protection of the public interest?

44. Which of the Commission's organizational elements performs analyses that examine the societal (including the economic) impact of Commission policies and decisions? Furnish a list of all studies of this kind performed since January 1, 1971?

45. Is there a Commission requirement that when rules and decisions are being prepared for formal issuance, they be supported by an analysis of the expected significant societal effects? If so, furnish copies of any directive documents governing such analysis, or its reporting to other Executive departments or agencies, or to the Congress.

46. Describe with particularity five major Commission actions in the past five fiscal years, where such studies were a major factor in the making of decisions.

47. Describe five agency proceedings over the past five fiscal years, in which the actions of your Commission importantly accelerated, delayed, or modified technology in the industry subject to your regulation. Illustrate in detail.

C. OPERATION AND WORKLOAD

48. Identify and describe the Commission's management information system(s) used internally to summarize data on operations and workload, and identify the principal management reports submitted to the commissioners.

49. How do these reports attempt to relate outputs to operating costs? Identify five reports from the last five fiscal years relating outputs to operating costs of major policy questions.

50. What control systems exist to monitor the processing time of the various categories of agency proceedings under consideration by your Commission? Do you manage your case workload through use of a docket system, with a docket register for various categories of agency proceedings?

51. How do you monitor progress of various agency proceedings from receipt until final Commission action? Is there a prescribed management control system for establishing priorities for considera-

tion, and what criteria pertain? Have norms been established for specific actions, and who monitors deviations from those norms?

52. Who determines the need for application of additional resources to either accelerate consideration of delinquent agency proceedings, or to give priority attention to selected agency proceedings of an urgent nature?

53. How does your management system give sufficient flexibility in personnel resources to expedite urgent or delinquent agency proceedings? Illustrate from Commission experience.

54. Enumerate the steps your Commission is taking to perfect your uniform agency caseload and activity reporting system, as initially developed by the Administrative Conference of the United States.

D. OUTSIDE SOURCES OF ADVICE

55. Identify any continuing and ad hoc boards, panels, and committees advising your Commission on its substantive and administrative activities whose membership includes non-agency personnel. Describe briefly the origin and special functions of each such advisory group. List all reports, showing recommendations, prepared by such advisory groups for consideration by the members of your Commission (last five fiscal years). Show Commission action or other disposition of those recommendations. State when and why any of your advisory groups was either established or disbanded, in the last five fiscal years. Describe the frequency with which these bodies met in the past five fiscal years. Describe how such bodies are provided staff assistance.

56. Identify, as of December 31, 1974, membership of all continuing or ad hoc boards, panels, or advisory committees by name, address, and job, or other industry affiliations (including consulting contracts) during the years 1971 through 1975. State whether any such persons held consulting contracts with your Commission or the industries it regulates on December 31, 1974.

57. Identify any contracts in excess of \$10,000 awarded to a consultant or consulting organization for performance of special studies and evaluation of your Commission's operations (last two fiscal years). Provide a concise Statement of Work required under each such contract.

58. Furnish a copy of your directory or register of consultants showing areas of specialty, employment affiliations, and amounts paid each for each of last five fiscal years.

E. GOVERNMENT-WIDE COORDINATION

59. Identify any inter-agency boards or groups on which commissioners and/or principal staff personnel of your Commission held membership as of December 31, 1974. Describe the mission of each of these groups.

60. Identify international, state and local boards, panels, councils, committees, and associations with which the commissioners or principal staff meet to exchange views or proposed changes in policies and practices or authorizing legislation. Indicate the specific subject matter and frequency of such meetings with each of these bodies during fiscal year 1975.

61. What executive branch departments and agencies do you meet with periodically? Which ones do you have formal liaison with? Which ones have you worked with closely in developing coordinated policy in the last five fiscal years? (Indicate both the department or agency, and the policy.)

62. Are there any areas in which your Commission's authority to regulate or otherwise fulfill its mission actually or potentially overlaps with, or is in actual or potential conflict with, the authority of another department, bureau, agency or commission? List in detail such areas of actual or potential overlap or conflict, including the relevant statutory provisions of all departments, agencies, etc., involved.

63. How has your Commission dealt with such problems of overlap or conflict? Describe in detail your Commission's attempts at resolution or accommodation of areas of overlap or conflict.

64. How has the existence of any area(s) of overlap or conflict of authority hindered or interfered with your Commission's ability to fulfill its mission?

65. Identify those areas, if any, over which your Commission does not have jurisdiction, but which you believe should be subject to your authority.

F. PERSONNEL POLICY

66. Does your Commission have a formal career development program? Describe how the career development program typically works. What in-service training is typically made available to your key career staff? How many of your career personnel were formerly management interns with your Commission? What is the rate of retention of your personnel in Grades GS-13 and above, by each such grade, over the past five fiscal years?

67. Are the names of any of those individuals selected for appointment to positions at GS-15 grade equivalent or higher, proposed by the White House or referred to the White House for approval, before appointments are made? List all instances of such White House activity in the past five fiscal years, including names of all White House liaison officers during this period.

68. What criteria are used for determining which positions or which proposed incumbents will be subjected to a White House approval procedure?

69. If these were practices that existed in the past, but no longer exist, when, by whom, and how was the change in policy and practice directed?

70. Does your Commission participate in the President's Executive Interchange Program? List all present and former participants from your Commission. Indicate positions in your Commission held at any time by Program personnel, and their previous employment affiliations.

71. How are the principal disciplines of Government (economics, engineering, law, public administration, accounting) represented among your senior staff skills? How are they represented on your professional staff as a whole? Give percentages for each major skill.

72. Provide copies of Civil Service Commission reports of examinations or investigations of personnel management policies and practices

issued to your agency during the last five fiscal years. Inventory agency corrective actions taken, and furnish explanations for those Civil Service Commission recommendations not adopted.

G. PUBLIC INTERACTION

73. Identify the specific occasions in the last five fiscal years where any commissioner, or employee at the GS-15 grade equivalent, has appeared as an invited speaker, panel member, or guest before industry and professional organizations, before conventions, and before state and local regulatory bodies or meetings, to discuss Federal regulatory policies and practices. For each such appearance, show the following:

- (a) Name of sponsoring organization and meeting's purpose_____
- (b) Location and date of session attended by Commission representative_____
- (c) Subject of Commission representative's presentation_____
- (d) Travel and subsistence costs of attendance_____ \$_____
- (e) Costs borne by—
 - (1) Government _____ \$_____
 - (2) Sponsoring organization _____ \$_____
 - (3) Commission person _____ \$_____
- (f) Speaker's honorarium or fee:
 - (1) Nature:
 - Cash _____
 - Other (specify) _____
 - (2) Value _____ \$_____

74. Identify the specific occasion in the last five fiscal years when any commissioner or principal staff person traveled abroad to discuss United States regulatory policies and practices with Government officials, before industry and professional organizations, or before conventions.

75. Give your annual Commission official travel budget for each of the last five fiscal years. Identify specifically costs applicable to (a) investigations and audit; (b) litigation; and (c) meetings.

76. Identify the specific occasions in the last five fiscal years when any commissioner or Commission employee appeared as a participant on a televised program to discuss regulatory policies and practices. Indicate whether appearance was on a national or local program.

77. Furnish a list of the journals, magazines, and other periodicals published by your Commission, with a copy of the most recent issue of each such periodical (periodicals are defined in paragraph 27-1, *Government Printing and Binding Regulations*, Joint Committee on Printing).

78. Furnish a list and copies of your regular publications, used to inform the public and consumer groups of the Commission's policies and activities.

II. OFFICE OF MANAGEMENT AND BUDGET REVIEWS

79. For each of the past five fiscal years, list and describe all Office of Management and Budget decisions increasing or decreasing money and personnel resources of your Commission.

80. If any major or significant new programs or activities were undertaken, or existing ones expanded, as a result of any such Office of Management and Budget initiated increases in authorization, identify them and describe.

81. If any on-going major or significant programs or activities were curtailed or eliminated as a result of any such Office of Management and Budget initiated decreases in authorization, identify them and describe. Specify how such actions have impacted upon your Commission's performance levels.

82. List all Office of Management and Budget denials of your Commission's requests for changes in your Commission's statutory authority in the last five fiscal years.

83. What requests for additional personnel at the super-grade level (GS-16 through GS-18) have been made to the Civil Service Commission in that same five-year time frame, and what has been the disposition of those requests?

I. FREEDOM OF INFORMATION ACTIVITY

84. What categories of information and/or records are the subject of Freedom of Information inquiries submitted to the Commission?

85. List all requests denied, reason for denial, whether litigation ensued, and disposition of that litigation.

J. EX PARTE CONTACTS/COMMUNICATIONS

86. Furnish two copies of your regulations governing Commission responsibilities in connection with ex parte communications affecting: (a) rulemaking, (b) adjudication, (c) licensing, and (d) other activities.

87. Furnish copies of your logs of all such communications for the past five fiscal years.

88. Does the Commission require officials exercising adjudicatory or rulemaking power to keep memoranda relating to the substance of all conferences, meetings, correspondence, telephone conversations or other contacts with representatives of a regulated industry or contractor of your Commission? Indicate whether all such memoranda are noted in your logs of ex parte communications.

89. Indicate whether there is a mechanism for including these memoranda in your Commission's public docket or record. Describe.

90. What procedure, if any, is used to register those who lobby your Commission? Furnish copies of such registry documents for the past five fiscal years.

K. LITIGATION CAPABILITY

91. To what extent is your Commission authorized to conduct litigation to fulfill its mission? List statutory authority, if any.

92. Is your Commission's current litigation authority adequate to fulfill its mission? Be specific.

93. Describe your Commission's relations with the Department of Justice on the litigation process. How are requests or recommendations to litigate initiated (from whom and to whom)? Is there a per-

manent liaison, communications or coordination process? Describe. Are your Commission's requests or recommendations usually followed? List all instances where such requests were not followed in the past five fiscal years. State reasons given. Does your Commission have an input in the preparation for trial or appeal of a matter? Describe the extent and manner of such input. Describe any instances in which your Commission has been deprived of an opportunity of making its views known to a court. Evaluate the quality of representation of your Commission by Department of Justice personnel with particular regard to the question of whether the expertise of the Commission has been adequately reflected in the presentation of specialized matters of particular Commission concern.

94. Estimate the costs, if any, of duplication of effort and the costs of coordination between your Commission and the Department of Justice in the litigation process.

95. Indicate the number of criminal referrals from your Commission to the Department of Justice in each of the last five fiscal years.

96. What types of sanctions, other than criminal referrals, has your Commission invoked in carrying out its regulatory functions? Show for each of the last five fiscal years the frequency with which each such type of sanction has been invoked. Where fines or penalties were levied, show the total dollar amount for each fiscal year and the average dollar amount per sanction, for each type of sanction.

At the end of your Commission's numbered answers to the Questionnaire, please insert the current date and appropriate signature.

Appendix F-2

QUESTIONNAIRE FOR SINGLE-ADMINISTRATOR REGULATORY AGENCIES

Food and Drug Administration, Environmental Protection Agency,
and National Highway Traffic Safety Administration

June 1975

I. History and Goals

1. Furnish a brief history of your agency, including specific reference to organic acts and amendments. Highlight major events which may have modified your agency's interpretation of its original mandate.

2. List the statutes administered by your agency as of June 1, 1975.

3. Describe the regulated industry(ies) as of December 31, 1960; December 31, 1965; December 31, 1970; and December 31, 1974, in terms of—

- (a) number of companies;
- (b) volume of business in terms of goods or services produced;
- (c) number of industry employees;
- (d) value of plant facilities, or firms;
- (e) profit levels: industry average and 10 largest individual companies; and

(f) concentration levels: largest four and largest eight firms.

4. Supply copies of any "Goals," i.e., policy objectives statements, issued by your agency in the last five fiscal years.

5. How, in the past five fiscal years, has your agency translated its basic policy into significant rulings, regulations, or programs? Give those examples you believe best illustrate such effect.

6. List and supply copies of all annual and other periodic or special reports required by statute or Executive Order to be submitted to the Congress or any of its Committees in the last five fiscal years.

7. List and supply copies of any required annual or other reports to the President (if different from the annual or periodic reports to the Congress) in the last five fiscal years.

8. Identify any Congressional hearings (other than the annual appropriations hearings), during the last five fiscal years, at which personnel from your agency have appeared as witnesses; the general nature of the subject matter of those hearings; and the names and titles of those individuals in your agency who participated in those hearings.

II. Executive Staff, Procedures, and Operations

A. PRIOR AND SUBSEQUENT EMPLOYMENT

9. Which agency heads, in the past five fiscal years, have come to your agency, directly or indirectly, from employment in or compensation by the industry regulated by or subject to your jurisdiction? Which of the agency's employees, GS grade 15 equivalent or higher, have come from such employment, directly or indirectly? Where indirectly, explain the circumstances. Employment includes, throughout, legal representation of a firm or consultant under contract to a firm in such regulated industry.

10. Which agency heads have, directly or indirectly, accepted employment or compensation in the industry regulated by or subject to your jurisdiction, within five years after termination of their agency service? Itemize and specify.

11. Does your agency maintain records of employment taken by separating GS grade 15 equivalent or higher grade personnel for the period—

(a) immediately following such separation; and

(b) for a period of at least five years following such separation.

12. If so, identify personnel from your agency, formerly at GS-15 level or higher, who have taken employment in the industry regulated by or subject to your jurisdiction.

13. What statutory or other constraints, if any, are currently imposed on former agency heads and GS grade 15 equivalent or higher grade personnel in terms of their—

(a) representing companies regulated by your agency at informal or formal hearings?

(b) appearing as representatives of citizens' groups and public interest groups?

(c) appearing as independent, expert witnesses?

14. What periodic checks do you make to insure that your requirements are adhered to?

B. PROCESS AND ORGANIZATION

15. Identify important current regulatory *process* problems, such as delays, excessive length of hearing records, costs of creating hearing records, backlogs, numbers of intervenors, judicial reversal of agency decisions, or other problems. Attach copies of all significant court decisions reversing decisions of your agency.

16. Summarize, from operating and statistical data, for each of the past five fiscal years—

(a) the time required for disposal of the average agency proceeding in the various categories handled. (*Agency proceeding* in this questionnaire is as defined in the Administrative Procedure Act.)

(b) the approximate average length of hearing records in such proceedings.

17. Describe those internal changes or reforms accomplished or attempted by your agency during fiscal years 1971 through 1975 to improve operating efficiency.

18. List complaints and recommendations concerning administrative procedures of your agency received during fiscal years 1974 and 1975 from—

(a) the industry or industries regulated by or subject to its jurisdiction;

(b) individuals, private citizens' groups and public interest groups; and

(c) governmental agencies or bodies, at the national or state level.

19. Describe how complaint letters are organized and indexed, and describe the way these letters are utilized in the regulatory process. Is the public given access to these letters? If yes, describe how. If not, explain.

20. By major category, list the oldest 20 agency proceedings currently before your agency by date, subject matter, and petitioner or affected party. Describe current status. List the 10 most recently promulgated agency proceedings, identifying the subject, the date of issuance, and the date the matter was initially presented for agency consideration.

21. Supply a copy of your agency's current organization chart showing the major operating and staff elements (e.g., bureaus, divisions, offices), together with the December 31, 1974 staffing levels for each of those organizational elements. Furnish two copies of your most current telephone directory.

22. Furnish copies of those directive documents setting forth the criteria for staff resource allocations to the major organizational elements.

C. PLANNING AND EVALUATION

23. Identify the major internal groups performing audits, personnel evaluations, compliance inspections, and/or program evaluation reviews of your operations, together with a list showing the reports issued by each group during fiscal years 1970 through 1975, the subject matter areas examined, and corrective actions taken.

24. Identify the organizational elements in your agency having responsibility for long-range policy planning as of December 31, 1974.

25. Describe how those elements currently report to your agency head and to the agency's principal budget officers.

26. List recommendations of those policy-planning elements adopted by your agency since December 31, 1971.

27. What General Accounting Office recommendations have been made to your agency following audits performed since January 1, 1971, and what action has been taken thereon by the agency? Specify.

28. How does your agency attempt to measure its effectiveness and the efficiency of its operations, in terms of—

(a) quality and level of service (or product) provided by the industry or activities and functions regulated?

(b) reasonableness of the cost to the public of that service or product?

(c) protection of the public interest (i.e. health and safety)?

29. Which of your agency's organizational elements performs analyses that examine the societal (including the economic) impact of the agency's policies and decisions? Furnish a list of all studies of this kind performed since January 1, 1971.

30. Is there an agency requirement that when rules, orders, and licenses are being prepared for formal issue, they be supported by an analysis of the expected significant societal effects? If so, furnish copies of any directive documents governing such analysis, or its reporting to other Executive departments or agencies, or to the Congress.

31. Describe in detail five major agency actions in the past five fiscal years, where such studies were a major factor in the making of decisions.

32. Describe five agency proceedings over the past five fiscal years, in which the actions of your agency importantly accelerated, delayed, or modified technology in the industry subject to your regulation. Illustrate in detail.

D. OPERATIONS AND WORKLOAD

33. Identify and describe your agency's management information system(s) used internally to summarize data on operations and workload, and identify the principal management reports submitted to the agency head.

34. How do these reports attempt to relate outputs to operating costs? Identify five reports from the last five fiscal years, relating outputs to operating costs of major policy questions.

35. What management control systems exist to monitor the processing time of the various categories of agency proceedings under consideration by your agency. Do you manage your case workload through use of a docket system, with a docket register for various categories of proceedings?

36. How do you monitor progress of various agency proceedings from receipt until final agency action? Is there a prescribed management control system for establishing priorities for consideration and what criteria pertain? Have norms been established for specific actions, and who monitors deviations from those norms?

37. Who determines the need for application of additional resources to either accelerate consideration of delinquent agency proceedings or to give priority attention to those of an urgent nature? Illustrate from recent agency experience.

38. How does your management system give sufficient flexibility in personnel resources to expedite urgent or delinquent proceedings? Illustrate from recent agency experience.

39. Enumerate the steps your agency is taking to perfect your uniform agency caseload and activity reporting system. What efforts are there to make it compatible with the uniform agency caseload and activity reporting system developed by the Administrative Conference of the United States.

E. OUTSIDE SOURCES OF ADVICE

40. Identify any continuing and ad hoc boards, panels, and committees advising your agency on its substantive and administrative activities, whose membership includes non-agency personnel. Describe briefly the origin and special functions of each such advisory group. List all reports, showing all recommendations prepared by such advisory groups for consideration by the members of your agency (last five fiscal years). Show agency action or other disposition of those recommendations. State when and why any of your advisory groups was either established or disbanded, in the last five fiscal years. Describe the frequency with which these bodies met in the past five fiscal years. Describe how such bodies are provided staff assistance.

41. Identify, as of December 31, 1974, membership of all continuing or ad hoc boards, panels, or advisory committees (including consulting contracts) by name, address, and job or other industry affiliations during the years 1971 through 1975. State whether any such persons held consulting contracts on December 31, 1974 with your agency or the industries it regulates.

42. Identify any contracts in excess of \$10,000 awarded to a consultant or consulting organization for performance of research, special studies, and evaluation of your agency's operations (last two fiscal years). Provide a concise Statement of Work required under each such contract.

43. Furnish a copy of your directory or register of consultants showing areas of their specialty, employment affiliations, and amounts paid each for each of the last five fiscal years.

F. GOVERNMENT-WIDE COORDINATION

44. Identify any inter-agency boards or groups in which your agency head or principal staff personnel held membership as of December 31, 1974. Describe the mission of each of these groups.

45. Identify international, state and local boards, panels, councils, committees, and associations with which your agency head or principal staff meet to exchange views on proposed changes in policies and practices or authorizing legislation. Indicate the specific subject matter and frequency of such meetings with each of these bodies during fiscal year 1975.

46. What executive branch departments and agencies do you meet with periodically? Which ones do you have formal liaison with? Which ones have you worked with closely in developing coordinated policy in the last five fiscal years? (Indicate both the department or agency, and the policy.)

47. Are there any areas in which your agency's authority to regulate or otherwise fulfill its mission actually or potentially overlaps with, or is in actual or potential conflict with, the authority of another department, bureau, agency or commission? List in detail such areas of actual or potential overlap or conflict.

48. How has your agency dealt with such problems of overlap or conflict? Describe in detail your agency's attempts at resolution or accommodation of areas of overlap or conflict.

49. How has the existence of any area(s) of overlap or conflict of authority hindered or interfered with your agency's ability to fulfill its mission?

50. Identify those areas, if any, over which your agency does not have jurisdiction, but which you believe should be subject to your authority.

G. PERSONNEL POLICY

51. Does your agency have a formal career development program? Describe how the career development program typically works. What in-service training is typically made available to your key career staff? How many of your career personnel were formerly management interns with your agency? What was the rate of retention of your personnel in Grades GS-13 and above, by each such grade, over the past five fiscal years?

52. Are the names of any of those individuals selected for appointment to positions at GS-15 grade equivalent or higher, proposed by the White House or referred to the White House for approval, before appointments are made? List all instances of such White House activity in the past five fiscal years, including names of all White House liaison officers during this period.

53. What criteria are used for determining which positions or proposed incumbents will be subject to a White House approval procedure? If these were practices that existed in the past, but no longer exist, when, by whom, and how was the change in policy and practice directed?

54. Provide copies of Civil Service Commission reports of examinations or investigations of personnel management policies and practices issued to your agency during the last five fiscal years. Inventory agency corrective actions taken, and furnish explanations for those Civil Service Commission recommendations not adopted.

55. Does your agency participate in the President's Executive Interchange Program? List all present and former participants from your agency. Indicate positions in your agency held at any time by Program personnel, and their previous and post-Program term employment affiliation.

56. How are the principal disciplines of Government (economics, natural and life sciences, engineering, law, public administration, and

accounting) represented among your senior staff? How are they represented on your professional staff as a whole? Give percentages for each major discipline or profession.

H. PUBLIC INTERACTION

57. Identify the specific occasions in the last five fiscal years where any agency head or employee at the GS-15 grade equivalent or higher has appeared as an invited speaker, panel member, or guest before industry and professional organizations, before conventions, and before state and local regulatory bodies or meetings, to discuss Federal regulatory policies and practices. For each such appearance, show the following:

- (a) Name of sponsoring organization and meeting's purpose-----
- (b) Location and date of session attended by agency representatives(s)-----
- (c) Subject of agency representatives presentation-----
- (d) Travel and subsistence cost of attendance-----\$-----
- (e) Costs borne by:
 - (1) U.S. Government-----\$-----
 - (2) Sponsoring organization-----\$-----
 - (3) Agency person(s)-----\$-----
 - (4) Other (specify)-----\$-----
- (f) Speaker's honorarium or fee:
 - (1) Nature (specify):
 - Cash-----
 - Other-----
 - (2) Value-----\$-----

58. Identify the specific occasions in the last five fiscal years when your agency head or principal staff person traveled abroad to discuss United States regulatory policies and practices with Government officials, before industry and professional organizations, or before conventions.

59. Give your agency's annual official travel budget for each of the last five fiscal years. Identify specifically costs applicable to (a) investigations and audit; (b) litigation; and (c) meetings.

60. Identify the specific occasions in the last five fiscal years when your agency head or an agency employee appeared as a participant on a televised program to discuss regulatory policies and practices. Indicate whether appearance was on a national or local program.

61. Furnish a list of the journals, magazines, and other periodicals published by your agency with a copy of the most recent issue of each such periodical. (Periodicals are defined in paragraph 27-1, *Government Printing and Binding Regulations*, Joint Committee on Printing.)

62. Furnish a list and copies of your publications routinely used to inform the public and consumer groups of your agency's regulatory policies and activities.

I. OFFICE OF MANAGEMENT AND BUDGET REVIEWS

63. For each of the past five fiscal years, list and describe all Office of Management and Budget decisions increasing or decreasing money and personnel for regulatory functions in your agency.

64. If any major or significant new regulatory programs or activities were undertaken, or existing ones expanded, as a result of any such Office of Management and Budget initiated increases in authorization, identify them and describe.

65. If any on-going major or significant regulatory programs or activities were curtailed or eliminated as a result of any such Office of Management and Budget initiated decreases in authorization, identify them and describe. Specify how such actions have impacted upon your agency's regulatory performance levels.

66. List all Office of Management and Budget denials of your agency's requests in the last five fiscal years for proposed changes in your statutory regulatory authority.

67. What requests for additional personnel at the super-grade level (GS-16 through GS-18) in your regulatory programs have been made to the Civil Service Commission in that same five-year time frame, and what has been the disposition of those requests?

J. FREEDOM OF INFORMATION ACTIVITY

68. What categories of information and/or records are the subject of Freedom of Information inquiries submitted to your agency.

69. List all such requests denied since enactment of the Freedom of Information statute, reason for denial, whether litigation ensued, and disposition of that litigation.

K. EX PARTE CONTACTS/COMMUNICATIONS

70. Furnish two copies of your regulations governing agency responsibilities in connection with ex parte communications affecting: (a) rulemaking; (b) adjudication; (c) licensing; and (d) other activities.

71. Furnish copies of your logs of all such communications for the past five fiscal years.

72. Does your agency require officials exercising rule-making, adjudicatory, or licensing power to keep memoranda relating to the substance of all conferences, meetings, correspondence, telephone conversations or other contacts with representatives of a regulated industry or contractor of your agency? Indicate whether all such memoranda are noted in your logs of ex parte communications.

73. Indicate whether there is a mechanism for including these memoranda in your agency's public docket or record. Describe.

74. What procedure, if any, is used to register those who lobby your agency? Furnish a listing and copies of such registry documents for the past five fiscal years.

L. LITIGATION CAPABILITY

75. To what extent is your agency authorized to conduct litigation to fulfill its mission? List statutory authority, if any.

76. Is your agency's current litigation authority adequate to fulfill its mission? Be specific.

77. Describe your agency's relation with the Department of Justice on the litigation process. How are requests or recommendations to litigate initiated (from whom and to whom)? Is there a permanent liaison, communications or coordination process? Describe. Are your agency's requests or recommendations usually followed? List all instances where such requests were not followed in the last five fiscal years. State reasons given. Does your agency have an input in the preparation for trial or appeal of a matter? Describe the extent and manner of such input. Describe any instances in which your agency has been deprived of an opportunity of making its views known to a court in the past five fiscal years. Evaluate the quality of representation of your agency by Department of Justice personnel, with particular regard to the question of whether the expertise of your agency has been adequately reflected in the presentation of specialized matters of particular agency concern.

78. Estimate the costs, if any, of duplication of effort and the costs of coordination between your agency and the Department of Justice in the litigation process.

79. Indicate the number of criminal referrals from your agency to the Department of Justice in each of the last five fiscal years.

80. What types of sanctions, other than criminal referrals, has your agency invoked in carrying out its regulatory functions? Show for each of the last five fiscal years the frequency with which each such type of sanction has been invoked. Where fines or penalties were levied, show the total dollar amount for each fiscal year and the average dollar amount per sanction, for each type of sanction.

M. RULEMAKING

81. Furnish copies of all your agency's directive documents governing procedures both prior and subsequent to publication of proposed rule-making. Where no written directives exist, describe in detail your normal operating practices in those circumstances.

82. In the pre-publication phase, describe your practice, in procuring help from professional and technical groups and consultants, whether on a fee basis or not. Furnish the names of the individuals and groups which have been retained in the past five fiscal years to assist in these proposed rule-making activities, and show the amounts, where appropriate, paid for these services. State whether any such individual or group held consulting contracts with your agency or the industries it regulates on December 31, 1974.

83. Describe the role of the Office of Management and Budget in the pre-publication phase of rule-making, including any inter-agency review process. List all instances, in the last five fiscal years, of Office of Management and Budget objections to any of your agency's proposed rules, either before or after publication. Indicate your agency's ultimate disposition of Office of Management and Budget objections. Is the Office of Management and Budget position made a part of the administrative record when a rule is finally promulgated?

84. Has your agency followed the practice, in the past five fiscal years, of consulting, on a formal or informal basis, persons, firms, or

entities outside your agency during the pre-publication phase of rule-making? If so, furnish copies of logs, minutes of meetings, or other records of these contacts in the past five fiscal years.

85. Does your agency consult with consumer or public-interest groups whenever it consults with private groups during the pre-publication phase of a particular rule-making? If so, furnish copies of logs, minutes of meetings, or other records of these contacts, in the past five fiscal years.

86. Are all these records of contacts available to the public, and if so, at what point during the rule-making process? Is access granted in response to requests, or is it accomplished by some form of public notification? Are all these records of contact made a part of the administration record?

At the end of your agency's answers to the Questionnaire, please insert the current date and the appropriate signature.

FEDERAL REGULATION AND REGULATORY REFORM
MINORITY AND DISSENTING VIEWS
AND
ADDITIONAL VIEWS OF HON. JOHN E. MOSS

MINORITY VIEWS OF HON. JAMES M. COLLINS

PART I—Introduction

Securities and Exchange Commission
Federal Trade Commission
Environmental Protection Agency

PART II—National Highway Traffic Safety Administration

Consumer Product Safety Commission
Food and Drug Administration

DISSENTING VIEWS OF HON. JAMES M. COLLINS AND
HON. ROBERT KRUEGER

PART III—Federal Power Commission

MINORITY VIEWS OF HON. JAMES M. COLLINS

Part IV—Increasing Public Participation
Quality of Regulators

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FEDERAL REGULATION AND REGULATORY REFORM

MINORITY AND DISSENTING VIEWS OF

HON. JAMES M. COLLINS

AND

HON. ROBERT KRUEGER

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PART I

MINORITY VIEWS OF HON. JAMES M. COLLINS

INTRODUCTION

At the very outset of these views, I want to make some highly approving remarks about the Subcommittee's report. I am compelled to say that this is the most comprehensive report that I have ever seen made by a Subcommittee of the Congress during my tenure. I have major disagreements with many of the conclusions and recommendations postulated in this report which I will attempt to enumerate in my later remarks. I also take exception to many of the case study discussions which I will also identify later.

In spite of the major disagreements that I have with this report, I do not in anyway want my views to detract from some of the superior work put forth in this report. As an example, I cite the sections of each report on the various regulatory agencies wherein the mandate of the particular agency is spelled out in some detail. I found this to be excellent and will serve as a research tool for many people for a very long time. Never to my knowledge, has so much material been collected about the functioning of the regulatory agencies in one place. I want to take this opportunity to congratulate Chairman Moss and the Subcommittee Staff on this tremendous effort.

In my views, I will comment to the extent possible on the areas of disagreement that I have with this report. I will have views on most of the Regulatory Agencies covered by the report, and I will also comment upon the more general chapters dealing with such things as "Increasing Public Participation."

The one point that I believe permeates this report is the need for increased public participation by consumers in agency proceedings and the establishment within the agencies of offices of public counsel where they do not now exist. I want to say rather forcefully that I am also for public participation in these proceedings, but the proposals for the implementation of this noteworthy goal found in this report are not acceptable to me.

I, for instance, do not look with favor upon the idea that there should be established within the agencies offices of public counsel. It seems to me that it is the function of the Commissioners or Administrators to protect the "public interest." This is their mandated responsibility. The question then becomes with respect to the implementation of that mandate how does a Commissioner accurately perceive what is in the public interest. First, all of the agencies have substantial staff support, and it is also the function of the staff to perform their duties in the public interest. It is, therefore, in my mind the function of the agency and its staff to determine what type of action or inaction

is in the public interest. It is yet to be demonstrated to me why this process cannot work. The agencies have the responsibility of regulating in the public interest. It seems to me that the framework that has been established is that you set up an agency to regulate. Within that agency's jurisdiction are the regulated industries. These industries in many cases do have the resources to put forth their position forcefully and effectively, although in some cases it may be that the position taken by industry may not be totally in the public interest, because their point of view is often narrow. How then do we provide a counterweight to these resources? We do it through the agency and its staff whose function it is to analyze carefully the position taken by the regulated industry with a careful eye to protecting the "public interest." That is their stewardship. I believe that the existing agency staff can, and should fulfill, and is now fulfilling that function. I do not see any evidence that they are not, and thus, I do not perceive the need for offices of public counsel.

I believe that offices of public counsel will only serve to obstruct this process by interjecting into the system this new element. I foresee staff pitted against staff, with accompanying internecine warfare within the Commission, and as such, I do not see this effect as being salutary. I do not object to different points of view, in fact, I believe them to be on balance wholesome, but the office of public counsel notion sets up an adversarial matrix which I believe would lead to chaos. Nothing good comes from chaotic conditions.

The argument for public counsel, as are most arguments for increased public participation by consumers, is that there will be a position or point of view, if you will, postulated that will be of benefit to the agency in making their decisions. It seems to me that it is incumbent upon the agency and its existing staff to develop an understanding of this point of view. I do not see how the office of public counsel will further these ends. I do not perceive a vacuum or a void in the system.

For many of the same reasons that I have already expressed, I am also opposed to an agency for consumer advocacy. What the Subcommittee report is proposing is that we establish an agency for consumer advocacy, establish offices of public counsel, and fund consumer activists for the purpose of intervening in agencies' proceedings. This in my opinion would serve only to exacerbate the system, not enhance it.

SECURITIES AND EXCHANGE COMMISSION

On balance, I agree with the Subcommittee's assessment of the SEC. I believe that the Commission is carrying out its statutory mandate.

I am specifically troubled, however, by the discussion in the report concerning the implementation of Section 11A(c)(4)(A) of the Securities Acts Amendments of 1975. The report states that in effect that the SEC failed to carry out the mandate of this Section. I believe this claim to be specious. The legislative history of the 1975 Amendments while indicating the preferences and reasoning of certain Subcommittees and Committees of the House and Senate with respect to exchange off-board trading rules does not evidence the intent of Congress in Section 11A(c)(4)(A) of the Act itself, as amended, since that Section of the Act has no direct predecessor in any of the House or Senate versions of the legislation which preceded

the Conference Committee's final product. Even H.R. 4111's Section 502 proposing to add a new Section 20B to the 1934 Act would have permitted off-board trading rules to remain in place in the event the Commission made certain findings. There is no indication, to my mind, that Congress expected off-board trading rules to be abrogated.

No legal question is raised by the SEC's action in December of 1975 amending exchange off-board trading rules. Section 19(c) of the 1934 Act, as amended, sets forth only the procedures and standards for SEC amendment of self-regulatory organization rules. Section 11A (c) (4) (A) requires only that a proceeding to amend off-board trading rules be commenced within the specified period (if certain SEC findings are made) and that such proceeding be concluded within 90 days thereafter. The manner of amending such rules (if amendment is determined to be required) is left entirely to the SEC's discretion, to be exercised on the basis of the explicit standards set forth in the 1934 Act.

The Subcommittee report devotes the bulk of its recommendations to the subjects of corporate accountability, auditing standards, and the disclosure laws, recommending numerous mandatory changes and calling for greatly expanded SEC activity, with a commensurate increase in budget and staffing.

Through its innovative voluntary compliance program for issuers and its cooperation with self-regulatory bodies in the accounting profession and the securities industry, the SEC has been able to provide taxpayers with very substantial investment protections at minimal expense. We cannot agree that there is any need for the increased expenditure called for in the report.

The SEC's policy of allowing accounting standards to be set in the private sector is well known to Congress and is working well. I note that in the past few years the SEC has become more active in requiring accounting disclosures if the standard setting bodies in the private sector have not proved adequate for a particular task. The FASB, which the report attacks, is a relatively new body, having been first established in 1973. It is the first full-time standard setting body established by the private sector and its funding is considerable. It has addressed many of the problem areas facing the accounting profession, and its efforts have been widely praised. Congress, in the Energy Policy and Conservation Act of 1975, recognized the work of the FASB and authorized the SEC to adopt standards promulgated by the FASB as if they were rules of the SEC. I believe that the SEC's historical policy in the accounting area should be continued. The adoption of uniform charts of accounts and the promulgation of uniform accounting standards by the government would be a monumental task. I see no need for that type of expenditure of time and effort at the expense of our taxpayers.

With respect to the related areas of corporate accountability and disclosure, I believe that the results achieved by the SEC, such as those evidenced by its Report on Questionable and Illegal Corporate Payments and Practices, clearly demonstrate that the SEC is carrying out its responsibilities in a measured and fully effective manner. Apart from the statutory changes requested by the SEC in that report, which would clarify their authority in this area, I do not support any new Congressional mandate to the SEC at this time.

FEDERAL TRADE COMMISSION

Generally, I agree with the recommendations set out by the Subcommittee report concerning the need to develop a workable system of determining priorities and of allocating resources to reflect those priorities. Indeed, I am troubled by what appears to be the very minimal amount of thought which is being given to planning future activities. I would also recommend that the Commission undertake to analyze the effectiveness and impact of regulatory actions once they are taken. Although the mandate of the Federal Trade Commission is wide-ranging, it is not an agency without considerable resources. Its 1977 fiscal year budget is \$52.8 million. This represents a budget increase of 13.5% in just five years. Prior to authorizing funds for the 1978 fiscal year and beyond, I believe that the Subcommittee should request that the Commission develop a systematic approach for determining future priorities and monitoring past actions.

The Commission's aborted investigation into the plant and nursery industry presents a good example of why such a priority system would be a useful device. This investigation was undertaken even though the Commission had received no consumer complaints with respect to the practices under investigation. (See Hearings before the Subcommittee on Federal Spending Practices, Efficiency and Open Government of the Senate Committee on Government Operations, 94th Congress, 2nd Session, December 4, 1975, and March 4, 1976.) I expect, at the very least, that the Commission would instruct its staff, as a general matter, to limit the initiation of investigations to those areas in which consumers have filed complaints.

With the passage of the Magnuson-Moss FTC Improvements Act during the 93rd Congress, Congress clarified the authority of the Federal Trade Commission to issue substantive rules defining what constitutes an unfair or deceptive act or practice within the meaning of the Federal Trade Commission Act. Although I agree that rulemaking can be a useful tool for the FTC to use in implementing its mandate, I am also concerned that rulemaking be used only in appropriate situations and in the manner contemplated by Congress when we passed the Magnuson-Moss Act.

The so-called "holder-in-due-course" rule is a good example of a Commission rule which has generated a great deal of unnecessary chaos and confusion in the regulated industries. First proposed in 1971, the rule became final in November, 1975, and became effective on May 14, 1976.

Although it had taken the Commission five years to put together a final rule on this subject, on the day the final rule was issued the Commission also issued a very substantial proposed amendment to the rule. Further, the Commission made no effort to explain the impact of the rule to those effected until May 4, 1976, just 10 days before the rule was to become effective, when the Commission staff issued guidelines attempting to clarify the impact of the rule. Unfortunately these guidelines only served to muddy the water. For example, prior Commission press releases left the general impression that retail charge accounts were not covered by the rule. The staff guidelines, on the other hand, indicated that most retail charge accounts were indeed subject to the holder-in-due-course rule. In addition, the definition

of the term "purchase money loan" raised innumerable questions which are just now beginning to be sorted out. The Federal Reserve Board has expressed fears that the rule may have an adverse effect on the cost and availability of consumer credit and may provide incentive for some lenders to shorten maturity periods of loans and for some merchants to shorten warranty periods. (See Statement of Federal Reserve Board, Hearings before Subcommittee on Consumer Protection and Finance, Committee on Interstate and Foreign Commerce, August 26 and 31, 1976.) Regardless of how one comes out on the question of whether or not the holder-in-due-course rule should be abolished, it is difficult to defend the manner in which the Commission put this rule into effect. Further, it appears that the Commission may have failed to consider the long-range impact which this rule may have on the consumer credit markets. Certainly, the Commission should be encouraged to carefully monitor the effects of this particular rule.

I am also concerned that the Federal Trade Commission may be using its rulemaking authority in a manner not contemplated by Congress when we passed Magnuson-Moss. The Commission's codification project (41 Fed. Reg., 3322) is a good example of my concerns in this area. The Commission's codification project involves promulgating trade regulation rules based on alleged principles of consumer protection law developed in individual cases and consent agreements. I caution the Commission against incorporating innovative or unique remedies developed in individual cases as general law applicable to an entire industry. Further, I question the wisdom of including consent orders within the scope of the codification project. Consent orders are often entered into for reasons unrelated to the question of whether a violation of the Federal Trade Commission Act has taken place. For example, a company may agree to a consent order because it cannot afford to litigate the issue. Consequently, I believe that consent orders are inappropriate as the basis for fashioning rules affecting an entire industry.

I also caution the Federal Trade Commission against using Section 205 of the Magnuson-Moss Act as a way of avoiding rulemaking altogether. This provision authorizes the Commission to seek civil penalties against a company which engages in a practice which was subject to a final cease and desist order against another company if that company has actual knowledge that the act or practice is unfair or deceptive. Cease and desist orders are often fashioned in a particular way based on unique factual situations. The Commission should not attempt, through Section 205, to impose on an entire industry by merely giving notice, a remedy appropriate only to the one particular company subject to the cease and desist order by alleging that failure to provide the remedy is itself a violation of the FTC Act.

Finally, I have some concerns over the procedures used in the rulemaking proceedings themselves. Specifically, we note that the presiding officers of the rulemaking proceedings are employees of the Bureau of Consumer Protection. Under the procedures in the Magnuson-Moss Act, rulemaking proceedings are now becoming adversarial in nature. In order to allay any fears as to the absolute objectivity of the presiding officer responsible for developing the factual record, who at the present time reports to the same superior as does the staff attorney advocating the Commission's position, I recommend that the Com-

mission consider using Administrative Law Judges as presiding officers in rulemaking proceedings.

I also disagree with the Subcommittee's conclusion that the courts are incorrectly applying the injunction standards set out in the Pipeline Act and the apparent recommendation that injunctions are to be granted whenever the Commission so requests. Although traditional equity standards clearly do not apply to injunctions sought by the FTC, I do not believe that the effect of the Pipeline amendments was to remove the court's ability to exercise independent judgment as to whether an injunction will be granted. Nor do I agree that the case law presently evolving on this point is inconsistent with Congressional intent.

Under the injunction authority granted the Commission in the Pipeline Act, a "public interest" standard supplanted the traditional equity standards. However, in determining whether the public interest standard has been met, the courts are directed to consider the likelihood of ultimate success on the merits and weigh the equities. In other words, the irreparable injury standard normally applicable to injunctive actions has been dropped with respect to injunctions brought under Section 13 of the Federal Trade Commission Act.

In reviewing the court's decision in *FTC v. Simeon Management*, 532 F. 2d 708 (9th Cir. 1976), I find nothing to indicate that the court did not properly apply the statutory standards for injunctive actions. Indeed, the court states:

In summary, we conclude that the legal standard for granting an injunction under either section 53(a) or 53(b) requires the district court independently to determine whether an injunction would be in the public interest. The court must base this determination on the likelihood that the FTC will succeed on the merits in proceedings for a final cease-and-desist order and on the balance of equities.

The standard applicable to injunctive actions brought under Section 13 is more fully discussed in *FTC v. Food Town Stores, Inc.*, 1976—2 Trade Cases 61,031 (4th Cir.). Citing the *Simeon* case, the court states, "As I view the statute, it prescribes as standards (1) the likelihood of success, and (2) a balancing of public equities." The court, in this case did grant the injunction.

Apparently, the real concern of the Subcommittee is that the Commission has lost some of the injunction actions it has brought. I do not believe that one can fairly infer from this fact alone that the courts are not applying the injunction standard properly. Indeed, as the conferees made clear in the Pipeline Act, "the inclusion of this new language is to define the duty of the courts to exercise independent judgment on the propriety of the issuance of a temporary restraining order or a preliminary injunction. (See Conference Report, 93-617, 93rd Congress, 1st Session (Oct. 31, 1973).) I expect that the courts will continue to exercise the same kind of independent judgment as they have in the past.

The Subcommittee endorses enactment of legislation such as S. 642 which would substantially enhance the ability of the Commission to enforce its subpoenas and orders requiring the submission of information. The Subcommittee cites the "line-of-business" litigation as evidence of a need for the legislation. The Bill would prohibit bringing an action challenging an FTC order prior to the issuance of a notice of default by the Commission.

Enactment of such a provision prohibiting pre-enforcement review in all cases would represent a significant change in the present state of the law. See *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). Further, the one Appeals Court which has addressed this question with respect to the line-of-business cases specifically found that pre-enforcement review of Commission's actions was proper. The Court stated:

In this case, the LB order issued to each of the appellees was clear-cut. As previously rehearsed, there was never any doubt but that the FTC contemplated full and prompt compliance. By the time appellees filed suit, the agency action requiring the LB reports was final: the Commission had denied original motions to quash, as well as renewed and amended motions. Appellees were placed in an immediate and real quandry: if they chose to comply with the LB orders, . . . they would have had to commit substantial resources—both in terms of money and manpower—to develop accounting techniques necessary for compliance and, as a result, suffer loss of profits; alternatively, they could refuse to comply, await FTC enforcement and risk civil fines for noncompliance.

See *A. O. Smith, Corp. v. FTC*, No. 75-1282 '89 at p. 24 (3rd Cir. Feb. 12, 1976).

Under the provisions of S. 642 not only would pre-enforcement review be unavailable, once the Commission did issue a notice of default, the respondent would have to either brave accumulating penalties of \$5000 a day or within 15 days obtain a stay of penalties in order to challenge the order. Further, the standards under which a court could grant a stay are entirely unrealistic and far beyond the "good faith" test presently applicable to such cases. See *Genuine Parts Co. v. FTC*, 445 F.2d 1382 (5th Cir. 1971).

Indeed, as pointed out by the American Bar Association in testimony opposing enactment of S. 642, the legislation very well may have "a potentially unconstitutional chilling effect on the right of the respondent to judicially contest the lawfulness of FTC process as to which there may be reasonable objections." (See Statement of American Bar Association, Hearings before Subcommittee on Consumer Protection and Finance, March 29 and 30, 1976.)

Frankly, in citing the line-of-business litigation, I do not believe that the Subcommittee has made a persuasive case for enactment of legislation as far-reaching as S. 642. Certainly, the Commission's line-of-business program is extremely controversial. This is to be expected of a program which calls not only for submission of documents, but indeed requires the creation of highly sensitive trade secret information which could be of enormous value to a company's competitors. As the Court in *A. O. Smith* notes:

The controller of one corporation had estimated compliance with the LB order would require eight months and an expenditure of about \$400,000. Tr. Oral Arg. at 20. Other estimates of the cost of compliance exceeded one million dollars per corporation. (Citation Omitted)

See *A. O. Smith v. F.T.C.* (supra, p. 5, n. 8).

Although the Subcommittee may disagree with the 4th Circuit's decision in *A. O. Smith*, I caution the Subcommittee from concluding that all actions for pre-enforcement review cannot be justified. Until the Commission can show that respondents are bringing pre-enforcement actions as a matter of course (a showing which the Commission has not made to date), I do not believe that present law, as governed by *Abbott Labs.* warrants tampering with.

NATURAL GAS RESERVES INVESTIGATION

The Subcommittee report takes issue with the role played by the Bureau of Economics (BOE) in this investigation. The report concludes that an analysis of BOE's position leads it to conclude that the "economists were attempting to challenge the legal sufficiency of the evidence" supporting the Bureau of Competition's (BOC) complaint memorandum. This in my view was clearly not the case.

The first question that must be asked is why BOE was called upon in the first place to review this material. I believe that the answer lies in the fact that those persons in BOC who were assigned to this case were principally Attorneys not specifically trained or educated in the area of statistical analysis. BOE was then asked not to review the legal sufficiency of the evidence, but, quite simply, to analyze the statistical presentations made in BOC's complaint memorandum. This is precisely what BOE did, and upon scrutiny BOE concluded that the statistics did not show what BOC was saying that they showed. BOC, you will recall, was saying that the statistics that they compiled demonstrated convincingly that there was under-reporting of reserve figures. BOE reviewed the BOC material for accuracy and completeness and found upon examination that the statistical presentation was woefully lacking. I find nothing wrong with such a review, and consider it to be altogether fitting and proper. BOE recommended against the issuance of a complaint, because the statistics compiled by BOC did not demonstrate a case of under-reporting.

It is interesting for me to note that after Dr. Mulholland and Dr. Salop of BOE testified, at the request of the Minority, before the Subcommittee that the Subcommittee heard testimony from Dr. David Schwartz. Dr. Schwartz was called upon by the Majority to give his analysis of the statistical presentation made by BOE for the purpose of rebutting BOE's testimony. Now, Dr. Schwartz is not a lawyer; he is an economist. If BOE was taking issue with the legal sufficiency of the evidence, why did the Subcommittee not call as its rebuttal witness a lawyer rather than an economist. I must conclude from these facts that BOE's presentation must have dealt with those things for which economists are educated and trained to address. Why else did the Majority perceive a need for the testimony of Dr. Schwartz? The point to be made here is that the Subcommittee does not uniformly look upon with disfavor testimony that calls for an analysis of a statistical presentation. It looks with disfavor only upon that testimony that is not in concert with its own views and were very dismayed by the fact that BOE concluded that the statistics did not make out a case of under-reporting. The Majority was unable to dent BOE's statistical presentation, so as any good advocate of a static position would do they sought to undermine the credibility of the witnesses by means of impeachment. They first sought to show that the BOE witnesses were biased by attempting to portray them as "advocates of deregulation". That approach did not bear fruit, and the Subcommittee has interestingly enough seemed to have dropped that argument. So what was left for the Majority? Their next approach then was that the economists were attempting to comment on the legal sufficiency of the evidence. A full reading of the BOE memoranda, and a review of their testimony be-

fore the Committee, will lead the fair-minded observer to conclude that BOE made an excellent analysis of BOC's statistical presentation, not a presentation on the legal sufficiency of the evidence.

The Commission evidently gave a great deal of credence to BOE's position, because they did not issue a complaint just as BOE recommended. This decision came even after the Majority had alleged that BOE was improperly commenting upon the legal sufficiency of BOC evidence.

PETROLEUM INDUSTRY LITIGATION (EXXON CASE)

The Subcommittee report finds that the "Commission's enforcement of antitrust responsibilities in major cases is hampered by the burdensome nature of its administrative proceedings, as in the current *Exxon* Case." My review of this case leads me to conclude that it is not the Commission's rules that have delayed the case. The problem with this case appears to me to be that it was undertaken by the Commission before it was prepared to do so. That being the case, this proceeding is a poor example by which to measure the adequacy of the Commission's structure or its Rules of Practice. This *Exxon* Case is one that was destined in my view to quagmire in administrative mismanagement.

The *Exxon* complaint challenges the structure of the petroleum industry on the basis of an amorphous and untested legal theory. Drastically compounding this basic problem is the fact that the Federal Trade Commission failed to investigate the petroleum industry adequately prior to the issuance of their "structure" complaint. As Commissioner Dixon recently testified before this Subcommittee, "we issued a complaint here without being ready. . . ." The Subcommittee report reflects that complaint counsel did not even know the companies' record-keeping systems, much less the contents of company documents, when the complaint issued. Instead of having their case substantially prepared, complaint counsel were faced with the virtually impossible task of obtaining all necessary documents on the structure of the petroleum industry and preparing their case during the adjudicative stage. Faced with such a burden, it is not surprising that more than three years have gone by without noticeable progress in the case.

The report attempts to trace the history of the litigation in terms of delay caused by the oil company respondents. In fact, the record of the case reflects that the *Exxon* proceeding is frustrated by complaint counsel's failure to define the issues in the case. Without an adequate investigation, complaint counsel had no documents upon which to base their contentions and could not respond in a meaningful way to early orders to delineate the issues.

Early in the *Exxon* proceeding, various respondents filed motions for a more definite statement based upon the ambiguous and inconsistent allegations of the complaint. Noting "the fact that there may be some ambiguity as to the legal theory underlying the complaint," the Administrative Law Judge nevertheless denied these motions stating:

Semantic deficiencies or other such problems as may exist may be better dealt with by various prehearing procedures, including discovery, than by motions for a more definite statement. (Memorandum Re Motions For A More Definite Statement, Etc., entered October 29, 1973.)

In line with that sentiment, on November 26, 1973, complaint counsel were required by December 10, 1973 to file a document "in the nature of a trial brief" outlining (1) issues of fact to be tried, (2) issues of law to be tried, and (3) position as to issues created by the pleadings, with applicable law and appropriate citations. In addition, complaint counsel were required to file:

(c) A list showing the name, address and business affiliation of each person intended to be called as a witness, together with a concise statement of the subject matter concerning which each is expected to testify and an indication of the allegations in the complaint to which such testimony is alleged to be relevant;

(d) For each expert witness intended to be called, his *curriculum vitae* or statement of qualifications;

(e) A list of the documents or other exhibits intended to be offered in evidence, together with an indication of the allegations in the complaint as to which each such document or other exhibit is alleged to be relevant.

Notwithstanding the clarity of the Administrative Law Judge's directive, on December 7, 1973, complaint counsel filed instead a "Proposed Schedule for Initial Phase of Prehearing." That document avowedly had as its one and only objective the postponement until some unspecified date of all discovery obligations, including those to identify witnesses and documents and meaningfully relate them to the allegations of the complaint.

On December 10, 1973, the Administrative Law Judge in a supplemental prehearing order noted that the "belated filing of complaint counsel's proposed schedule (virtually on the eve of the date that the lists of witnesses and documents were scheduled to be filed) is deplored." That notwithstanding, in a spirit of tolerance undoubtedly based upon the reasonable expectancy that complaint counsel would, if given more time, produce a meaningful submission, the Administrative Law Judge permitted the filing of the witness and document lists to be "extended to a date to be determined by further order of the Administrative Law Judge after consideration of the matter at the prehearing conference on December 18, 1973."

At the prehearing conference of December 18, 1973, Judge Moore stated on the record that he was "dismayed and shocked" to find that there had been no filing by Government counsel [on December 10] (Prehearing Conference, December 18, 1973 Tr. at 11) and emphasized that he would not "tolerate defiance of my orders" (Prehearing Conference December 18, 1973 Tr. at 102). The Administrative Law Judge orally extended by another four months the time within which complaint counsel were to file their list of documents and witnesses. The date for the filing of complaint counsel's trial brief was also extended.

On February 7, 1974, the Administrative Law Judge issued an "Order Specifying Further Prehearing Procedures and Scheduling Further Prehearing Conference." Judge Moore took the occasion to expand on the type of document and witness lists complaint counsel were expected to file:

Although the undersigned has recognized the magnitude of the task confronting complaint counsel in marshalling the evidence for this case, he is also aware of the Commission's administrative policy that a case should be reasonably ready for trial when the complaint is issued. . . . Accordingly, in the interest of moving this case toward trial as expeditiously as possible, it is not unreasonable to require complaint counsel to disclose to respondents the evidence now in hand

that is expected to be presented in support of the complaint. This comment is particularly applicable to the documentary evidence.

It shall be understood that such lists of documents and witnesses shall be subject to supplementation or to other modification in the light of developments in the course of further prehearing procedures. However, *complaint counsel are expected to make a good-faith disclosure of the evidence now intended to be present at trial.*

* * * * *

The Commission has said that "every matter should be adequately investigated before complaint issues" (*Allstate Industries of North Carolina*, 74 F.T.C. 1591-92 (1968)), so that complaint counsel should have "evidence sufficient to support a *prima facie* case before issuance of the complaint" (*Lehigh Portland Cement Co.*, 74 F.T.C. 1589, 1590-91 (1968).) (Emphasis added.) (Order of Feb. 7, 1974, pp. 2-3.)

Despite the fact that time had been extended twice for complaint counsel's compliance with the witness and document list requirement, complaint counsel, by motion filed February 20, 1974, sought to modify the procedures set forth in the February 7 order and, specifically, to eliminate the requirements that they (1) produce a list of documents and witnesses, and (2) that they furnish copies of the listed documents to respondents on or before the April 23 prehearing conference. On March 12, 1974, the Administrative Law Judge issued an order denying complaint counsel's request for modification of the February 7 order and directed complaint counsel to identify witnesses and documents and to produce the identified documents as a part of prehearing procedures in the *Exxon* case.

Apparently as the direct result of an insubstantial pre-complaint investigation, complaint counsel, on April 8, listed only five F.T.C. employees as potential witnesses and 300 pages of documents from an F.T.C. investigation that did not even relate to the structure of the industry.

Complaint counsel's non-compliance with the thrice-issued order of the Administrative Law Judge was the focal point of the April 23, 1974, prehearing conference. The seriousness of that issue prompted the Administrative Law Judge to terminate the prehearing conference—deferring consideration of numerous matters set forth in a proposed agenda. Before concluding the conference, the Administrative Law Judge charged complaint counsel with the obligation of providing a "forthright explanation" of the contents of the list of witnesses and documents:

Judge MOORE. Maybe we better leave this and give you [complaint counsel] a chance to file a considered answer. But I would like to have what I would consider a more forthright explanation than I have had thus far as to why a different and more complete production could not have been made (April 23, 1974, Prehearing Transcript at 223-224).

This issue was fully briefed by complaint counsel, along with respondents' various sanction motions. On June 20, 1974, the Administrative Law Judge entered an "Order Denying Respondents' Motions for Preclusion Order and Other Sanctions," stating:

After careful consideration of the motions and supporting briefs of all counsel, the administrative law judge has concluded that the motions should be denied and that the question of the timing of a supplemental disclosure by complaint counsel of their witnesses and documentary evidence should be held in abeyance for the time being. This determination is based on the showing made by complaint counsel to the effect that although they have investigational files that were considered sufficient to give the Commission 'reason to believe' that there had been

a violation of law and that the issuance of a complaint would be in the public interest, they have little or nothing in the way of evidentiary material in a form appropriate for introduction in evidence. . . . (Order at 6).

A great deal of time and expense was consumed as the respondents challenged complaint counsel's legal right to engage in an investigation during an adjudication. At the same time, the oil companies sought to narrow the case into manageable proportions. Though denied a more definite statement of the general charges in the complaint, respondents at each opportunity sought clarification and delineation of the issues in the *Exxon* proceeding. Thus, in response to the Administrative Law Judge's Order of February 7, respondents, on March 25 and 26, filed statements of issues of law and fact and positions as to issues created by the pleadings.

These statements, in turn, resulted in the Administrative Law Judge ordering extensive briefing on six major issues:

(a) Whether Congress has excluded from the FTC's jurisdiction acts and practices of common carriers (pipelines) thereby preventing the Commission from examining Respondents' pipeline activities;

(b) Whether the Commission lacks jurisdiction to challenge Respondents' acts and practices which are subject to other federal agency and state jurisdiction or which result from compliance with federal and state law;

(c) Whether individual or joint actions by Respondents in attempting to influence governmental actions are protected by the First Amendment or are otherwise exempt from the antitrust laws and FTC Act;

(d) Whether allegations regarding Respondents' activities in foreign commerce and their relationships with financial institutions are outside the scope of the complaint authorized by the Commission;

(e) Whether the *Exxon* proceeding must exclude any subject matter covered by prior judicial or quasi-judicial decrees or orders in a proceeding to which the U.S. or any agency thereof was a party; and

(f) Whether prior to issuance of the complaint or prior to hearing, the Commission is obligated to file an environmental impact statement.

Though respondents sought to narrow the *Exxon* case on these grounds, each of respondents' arguments was denied.

The Subcommittee report notes that complaint counsel were forced to seek the extraordinary relief of a motion for major procedural relief during the course of the *Exxon* case. Again, complaint counsel's Motion for Major Integrated Procedural Relief, filed October 18, 1974, was not caused by the inadequacy of the Commission's Rules, but instead was a direct result of the lack of sufficient investigation prior to the issuance of the complaint. For this reason, complaint counsel found it necessary to propose the following:

1. The adoption of the discovery provisions of the Federal Rules of Civil Procedure or, in the alternative, "interpreting" section 3.33 of the Commission's Rules of Practice so as to favor discovery.

2. The adoption of the "Manual for Complex Litigation" as a guide for the conduct of this case.

3. The appointment of a second Administrative Law Judge to rule on discovery-related matters.

4. The adoption of their proposed schedule for the prehearing phase of the case.

Respondents argued that it was inherently unfair and would constitute a denial of due process of law to change the Commission's Rules of Practice, when the change is for a selected adjudicative proceeding, after initiation of that proceeding. It is interesting to note that the relief sought by complaint counsel—new rules for *Exxon*—was specifically considered and rejected by then Director of the Bureau of

Competition, James Halverson, during a hearing before a Subcommittee of the House Committee on Appropriations in 1974. Mr. Halverson was asked by Chairman Whitten whether a change in the Commission's procedural rules would "shorten the time required to prosecute" the *Exxon* case. Mr. Halverson responded as follows:

Cases of the dimensions of the *Exxon* matter necessarily are very time-consuming. The collection and processing of documentary evidence, which may run to millions of document pages, may take many months, or even years. *The Commission's procedures, which are determined in large part by the requirements of the Administrative Procedure Act and due process*, call for full trial on a public record and full review by the Commission and the courts on written submissions of briefs, findings, and oral arguments. *To a large extent, therefore, specific changes in the Commission's rules of procedure would not drastically reduce the time required to bring this type of case to a conclusion.* I might add, to the extent that it lies within the power of the Commission staff to avoid delay, we are making, and shall continue to make, every effort to staff this case with a maximum of available manpower and to afford it continued priority treatment. (Emphasis added.)

By Order issued March 4, 1975, the Federal Trade Commission denied complaint counsel's motion in all respects. While the Commission thus recognized that it would be contrary to the principle of fundamental fairness to tailor special rules for individual cases, the importance of that entire matter is the following: If an adequate investigation had occurred, complaint counsel would have had documents in hand and would not have had to seek to modify the Commission's Rules for adjudications.

It also should be recognized that since complaint counsel did not have any of respondents' documents they apparently believed it necessary to seek an order from the Administrative Law Judge requiring respondents to preserve all of their documents. Such an application had never before been made in a Federal Trade Commission proceeding, because in the normal case complaint counsel have documents in their possession and have no need to seek a preservation order to protect documents in the possession of a respondent. The *Exxon* respondents challenged the unprecedented order at the Commission and, later, in Federal District Court. The United States District Court for the District of Delaware ruled that the preservation order had been improvidently issued, and the order was vacated.

The lack of an adequate investigation continues to plague the *Exxon* proceeding. The inadequate preparation of the case has prompted two separate Administrative Law Judges to suggest to the full Commission that the entire adjudicative proceedings be withdrawn in favor of a full-scale investigation. The second such order of the Administrative Law Judge, issued October 20, 1975, recognized that even if there had been an adequate investigation, events on both the foreign and domestic scene may have transcended the set of circumstances which prompted issuance of the complaint on July 18, 1973.

Reasoned decision mandates that the Federal Trade Commission properly exercise its discretionary powers and withdraw the *Exxon* case from adjudication, under Part 3 of its Rules, and place it into investigation, under Part 2 of its Rules. It is fallacious to claim, as does the Subcommittee report, that the respondents have engaged in deliberate delay in the *Exxon* litigation. The report states that many motions were filed by the respondents without "substantial legal basis." The record in the *Exxon* proceeding reflects a continuing effort by the

respondents (1) to oppose complaint counsel's efforts to investigate the industry during the course of an adjudication, (2) to obtain a definition of the issues in the case with more particularity than the conclusory allegations in the complaint, (3) to eliminate superfluous and unfounded contentions from the proceeding so as to expedite the ultimate hearing, and (4) to seek discovery from Government agencies to obtain evidence to support the contention recognized in the Preliminary Staff Report that Government actions and regulations were in large part responsible for the 1973 petroleum shortage.

The continuing problems in the *Exxon* litigation resulting from lack of a sufficient pre-complaint investigation are highlighted by the massive subpoena proposed by complaint counsel for respondents' documents. Complaint counsel acknowledged that their subpoena asks for "tens of millions" of documents. Each respondent has filed affidavits attesting to the massive burdens that would be involved in responding to complaint counsel's proposed subpoena. It was estimated that the subpoena called for a production of hundreds of millions of documents, at a cost of tens of millions of dollars and requiring thousands of man-years of effort. Thus, while complaint counsel's major activity for the past three years has been directed toward satisfying their often expressed need to obtain information about the petroleum industry and respondents which would enable them to draft a subpoena for "specific records," it appears that they have failed to satisfy their needs and will shortly engulf themselves in a very deep sea of documents.

Again, it is painfully apparent that the failure to adequately investigate the industry prior to bringing an industry-wide complaint is what has forced complaint counsel to demand virtually every document that is currently in the respondents' possession. Indeed, it is significant that complaint counsel themselves have complimented respondents on their cooperation during their 28 months of post-complaint interviews and depositions of respondents' officers and employees. At the December 16, 1975, prehearing conference, complaint counsel stated: "I would like to commend respondents' counsel for their cooperation in this matter. They were extremely cooperative." In short, complaint counsel's inability to prepare an efficient, effective and manageable subpoena is a result of the Commission's failure to take advantage of their investigatory powers. While complaint counsel have proposed issuance of a subpoena that possibly they cannot even manage, it is certain that the subpoena, which may very well be the most encompassing demand for documents in the history of American jurisprudence, will surely cause a lengthy delay while a Federal District Court reviews its legal validity.

As noted above, the *Exxon* proceeding is a poor vehicle by which to measure the adequacy of the Federal Trade Commission's Rules of Practice. The Commission has already ruled that it will not reform its Rules of Practice to accommodate the problems of one particular adjudicative proceeding. Indeed, the Federal Trade Commission has proposed new Rules of Practice intended to expedite its proceedings. In the normal case, the revised Rules will ensure that adjudications will proceed more expeditiously. There is no way, consistent with the fundamental principles of due process of law, that the Rules governing that adjudication can be altered to solve the problems. The lesson

of the *Exxon* litigation is that if the Federal Trade Commission seeks to engage in industry-wide adjudicative proceedings, it is imperative that adequate investigations precede issuance of such "structure" complaints. The premature issuance of a complaint without the aid of an investigation will only lead to a misallocation of the Commission's physical and fiscal resources through unnecessary protracted proceedings.

Another thing that I must take note of in this report is the recommendation made that the FTC should have the right to bring its suits directly into Federal District Courts. The delay in the *Exxon* case is used to justify this recommendation. The report specifies that proceeding with the case in this manner would allow the Commission to gain the advantages of the Federal Rules of Civil Procedure. This would, in my opinion, not solve the problem.

The Federal Rules of Civil Procedure which the Subcommittee lauds by inference as being the tool which would enable Federal Courts to handle cases faster are themselves under fire for contributing to delay. The open-ended discovery under the Federal Rules of Civil Procedure conducted as they are, with practically no supervision by the courts, results in delay from too much, virtually endless discovery by all parties. Further, with eight respondents seeking discovery, trial before 1985 is no more likely before a Federal Court than before an Administrative Law Judge.

Furthermore, the Federal Courts are operating under a crushing burden, partly as a result of the new legislation and new causes of action created by the Congress over the past decade and partly from the fashionably activist stance which encourages everybody to sue everybody else. Cases in the Federal District Courts can sit several years waiting for a trial date, even though ripe for hearing.

Moreover, moving FTC actions into the Federal Courts would eliminate one of the principal cornerstones on which the FTC was established—creation of a body with special knowledge and expertise. I fail to understand why the Majority would want to move FTC actions into the Federal Courts, thus forfeiting the FTC's expertise, while at the same time complaining in the Sections dealing with FTC injunctive power that the Federal Courts are misinterpreting the FTC's mandate and not giving enough credit to its expertise.

LINE OF BUSINESS PROGRAM

The Subcommittee report in its discussion of "obstacles to obtain information" recites the Commission's need for trade data then jumps to the conclusion that it should get all the data it seeks as fast as possible with objections swept away. It, thus, opts for the passage of legislation similar to S. 642 which would have the effect of limiting due process rights of those persons impacted by FTC action. What the report, thus, seems to be saying is that all Commission actions are so inherently right that they should be challenged only at one's peril. Let us face the fact that the Commission is not an infallible body—it does, has, and will continue to make mistakes, especially when breaking new ground such as with this program. Those who are affected by the Commission action should have the right to relief in the courts if it is warranted.

This is especially so where this Congress has delegated sweeping power such as contained in Section 6(b). This broad grant of authority contains the potential for massive abuse. Indeed, the FTC is already demanding such things as Line-of-Business Reports, Corporate Patterns Reports and Quarterly Financial Reports from a wide spectrum of American business. These mountains of somewhat repetitive data will no doubt be grist for the Federal Paperwork Commission's (paper) mill.

The Line-of-Business litigation will be decided in due course, and the FTC will be able to operate within boundaries defined by the courts. The Commission will have learned something and can then proceed with its tools tempered in the courts. It would seem unwise for the Congress to change the law to correct Commission shortcomings when the Commission will soon be learning from its mistakes and be able to move forward vigorously.

The objections to LOB do not go to the Commission's authority, but to improper methods of proceeding and to the question of whether there are fundamental problems with the statistical concepts as measured against the Commission's stated objectives. The Commission's Line of Business Report should have the full review of the courts. It may well be that the LOB will be of inestimable value, well conceived and executed. It may also be otherwise, and the public deserves to have the question raised and answered.

ENVIRONMENTAL PROTECTION AGENCY

MOBILE SOURCE EMISSION CONTROL

The Subcommittee report's discussion of mobile source emission control indicates that a disproportionate share of EPA's resources are utilized administering the certification program. Implicit in this criticism, as I read it, must be the Majority belief that the Clean Air Act sets equal priorities for the four programs that it administers in this area. It seems clear to me that the Act did not establish equal priorities.

The Act's four programs are (1) certification; (2) selective enforcement audit; (3) recall; and (4) inspection/maintenance. The Clean Air Act mandates a certification program, thus, it would seem that EPA's resources should be devoted more to a required program rather than one that was only authorized and not mandated such as SEA. It is also apparent to me that these programs are redundant, because if certification, for instance, worked SEA and recall would be by and large unnecessary.

I gain the impression from the report, however, that the Majority believe that certification cannot ensure that an effective prototype design can be carried through to mass production. Thus, they are calling for increased emphasis on SEA. I believe, however, that certification which requires automobile manufacturers to submit detailed applications for certification to EPA, and which also requires them to comply with elaborate reporting and testing requirements in order to make "running changes" to production vehicles can be an effective program. Additionally, under this program, EPA enforcement officers now enter manufacturers' facilities in an established manner and inspect production vehicles to assure that they conform to their certified configurations.

Because of what I have outlined above, I have some rather serious doubts about the cost effectiveness of SEA. I realize that Mr. Train says that SEA is justifiable on cost-effect grounds, but I have not seen any study from Mr. Train on this point. I, however, do not know if EPA took into account such things as a plant shutdown.

The SEA regulation is not lenient as the report suggests. Although the SEA program specifies a 60% pass rate, it implicitly carries the "every car" interpretation which makes it more stringent than the Section 202 certification standards, which address the "average" car built. Congress intended a 90% reduction in emissions inventories from the uncontrolled cars. The air quality is a function of the overall average emissions of the vehicle fleet. To require every car to achieve the 90% reduction, sets a considerably more stringent standard, since manufacturers would be required to achieve a greater average reduction in order to assume that the tails of the normal distribution curve fell under the standards.

PESTICIDE REGULATION

The Subcommittee report in my estimation shows a definite misunderstanding of the mandate given to EPA under FIFRA. I do not find this misunderstanding surprising, since FIFRA is not within the legislative jurisdiction of the Committee on Interstate and Foreign Commerce, and as such, lack of familiarity does often lead to misconceptions and misunderstandings.

The appropriate Committees on Agriculture in the House and Senate are the promulgators of FIFRA, and as such they are in a much better position to determine what factors must be taken into account in the area of pesticide regulation. Pesticides are, after all, poisons—designed to kill pests and are also essential to man's food supply both as to quality and quantity. At the same time, pesticides may cause injury through accidental ingestion, or inhalation, or when improperly used they may endanger useful insects, birds and animals. The appropriate Committees in enacting this legislation recognized the advantages of pesticides as well as the disadvantages associated with their use. Accordingly, in the legislative history of FIFRA, Congress confirms "their (pesticides) wise control based on a careful balancing of benefit versus risk to determine what is best for man is essential."

The EPA is to protect man and the environment from unreasonable adverse effects resulting from the use of pesticides. Time and again in this report reference is made to such effects, but in a context that is contradictory to the statutory definition given in Section 2(bb) of FIFRA which is as follows: "* * * any unreasonable risk to a man or the environment *taking into account the economic, social and environmental costs and benefits of the use of any pesticide.*" (Emphasis added)

FIFRA, thus, takes into account the fact that pesticides in spite of their potential for harm have redeeming social and economic value. The Subcommittee report, as I read it, would have us ignore the language of FIFRA that I have emphasized above.

The Subcommittee report indicates that:

At the time of the Aldrin-Dieldrin suspension, the transcript of the cancellation hearing had exceeded 24,000 pages, not including thousands of pages of witnesses'

statements. This generous grant of additional procedural rights by EPA's registration scheme benefits only the manufacturers and formulators of pesticides, not the public. Pesticides unless known certainly to be safe or hazardous, will be presumed safe until proven otherwise. Whether this is sound policy for the agency whose primary mission is protection of the public against environmental stress might appear arguable, but in view of recent EPA and GAO findings with respect to the quality of data submitted to the EPA by registration applicants, this policy is wrong and subjects the public to unnecessary and significant health risks.

The procedural rights provided by EPA in granting conditional registration is not novel in conception. Its origin is squarely within 5th Amendment rights of requiring due process of law before being deprived of property. Congress explicitly provided for procedures governing the suspension and cancellation of registrations in Section 6 of the Act and required the finding that the pesticide causes unreasonable adverse effects on the environment before such pesticide could be cancelled or suspended. Absent data which confirms such a finding, the Administrator statutorily does not have the authority to suspend or cancel. Again a conditional registration seems to be the only legal and practical option.

If the concept of the report were adopted, no pesticide could be reregistered unless registration was first cancelled and the registrant demonstrated that there was no adverse effect on the environment. In which case the result would be devastating on agriculture.

The Subcommittee report makes the following statement with respect to conditional registration:

Moreover, a conditional registration may be terminated *only* by proceedings to cancel. If no data are submitted, the conditional registration may be terminated by cancellation alone. So, too, an unconditional registration may be terminated only by proceedings to cancel. In effect, then, no distinction exists between conditional and unconditional registration. Moreover, EPA promises to initiate proceedings to suspend or cancel a conditionally registered pesticide on the basis of submitted data only. "*if submitted data establishes that the pesticide may generally cause unreasonable adverse effects on man or the environment . . .*" That language directly contravenes the statutory mandate. EPA unilaterally has shifted to itself the burden of proof on the unreasonable adverse effects issue. In this way section 3 of FIFRA, as amended, requiring pre-registration review of all pesticides for unreasonable adverse effects, is evaded by the terms of the May 27, 1976 notice.

Cancellation hearings are formal adjudicatory procedures, which are time consuming and costly. The DDT administrative hearing lasted 7 months; 125 witnesses appeared to testify; 365 exhibits were placed in evidence; and the transcript was longer than 9,000 pages.

EPA has not shifted the burden of proof by permitting conditional registration. Section 3(c)(5) requires the Administrator to register a pesticide if he determines that when considered with any restrictions imposed under subsection (d):

- (a) its composition is such as to warrant the proposed claims for it;
- (b) its labeling and other material required to be submitted comply with the requirements of the Act;
- (c) it will perform its intended function without unreasonable adverse effects on the environment; and
- (d) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

When conditional registrations are granted there presumably would not be any data which would establish that the pesticide causes unrea-

sonable effects on the environment. The requirement of additional studies are a result of the developing state of the art and could require 2-4 years to complete. Assuming at the time the conditional registration is granted there is no data which establishes the pesticide causes unreasonable effects on the environment, how then can the Administrator legally not register the pesticide? It seems only practical that a conditional registration be granted to allow the registrant time to run studies and obtain the additional data required.

In the interim, however, the Administrator still has the authority to suspend the pesticide at any time, in his judgment, that such action is necessary to prevent an imminent hazard. Section 6(e)(1) of the action states:

If the Administrator determines that action is necessary to prevent an imminent hazard during the time required for cancellation or change in classification proceedings, he may, by order suspend the registration of the pesticide *immediately*. No order of suspension may be issued unless the Administrator has issued or at the time issues notice of his intention to cancel the registration or change the classification of the pesticide. (Emphasis added)

In any event, the registrant at all times has the burden of proving the pesticide when used in accordance with widespread and commonly recognized practice will not generally cause unreasonable adverse effects on the environment and that burden remains with the registrant.

PART II

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

The report states that vehicle damage and personal injury cost annually \$22 billion, or an average of \$2200 per vehicle during its lifetime. These calculations are found in the Subcommittee's discussion of what savings can be achieved by further safety standards. The report, thus, implies that these are the "benefits that are achievable by vehicle safety and cost saving countermeasures" and, thus, further implies that \$2200 is available per new car for the cost of new safety standards.

I have great difficulty with the logic of this position. The implication that a \$2200 investment in each new car, or a total of \$22 billion, would in return eliminate all fatalities, injuries and property damage related to motor vehicle transportation is erroneous. It takes very little analysis to realize that an investment of \$22 billion would have to be 100% effective in order to eliminate all of the \$22 billion loss. Let us say that we spent the \$22 billion, and again for the sake of argument say that it was only 50% effective, there would still be an \$11 billion loss remaining. This would justify someone concluding that there was justification for spending an additional \$11 billion on top of the \$22 billion already spent. This would result in a total increase of \$3300 per car, and this continuum could be carried further and further.

PASSIVE RESTRAINT STANDARD

The Subcommittee report recommends that the highest priority for NHTSA should be the setting of a passive restraint standard. Although there are many types of passive restraint systems, the principal one under consideration is the so-called "air bag" or "air cushion." I am unalterably opposed to mandating, at this time, that all new cars shall be equipped with air bags. This recommendation, of course, emanates from the realization that too few persons utilize the safety belt restraints that are already mandated.

The concept of the air bag is an extremely appealing one. Unlike safety belts, it would require no action on the part of the automobile occupants. Unfortunately, after years of experimentation, the air bag has not lived up to its expectations. If NHTSA were to mandate air bags at this time, I believe that it would be a grave mistake, because I do believe they have yet to be fully perfected. Until such time as it has been perfected, I cannot sanction the additional expense to consumers for a system that may not work. The goal of saving lives is the most important one that I can think of, but if the system is not perfected, it may cost lives rather than save them.

The air bag, as it is presently designed, will protect the occupants of the front seat of the automobile in frontal or near-frontal crashes. It does not protect the occupants from side or rear-end collision, and it also affords no protection in the event of rollover. If air bags were mandated for all cars, it would cost up to 3.5 billion dollars to outfit one year's cars, and it would take at least ten years to equip all of the cars on the road. I really cannot consent to such a drastic step at this time.

General Motors offered air bags in model years 1974, 1975, and 1976, with investment costs of \$60 million. In these three years, less than 10,000 have been sold with less than 100 being sold in 1976. These sales figures also include those fleets purchased by insurance companies as part of a promotion matter. Repeat sales were also less than 100. This in my opinion speaks very poorly for consumer acceptance of air bags. Consumers simply do not want air bags. Why should we require them to purchase a vehicle with a restraint system of questionable value? It is of questionable value in my mind because testing in actual field conditions which is vitally necessary to establish air bag effectiveness is completely inadequate to allow evaluation of its life-saving potential. Additionally, I think another telling point about air bags is that I know of no Member of Congress or of the Executive Branch, including NHTSA, who has purchased a car equipped with this type of restraint system, despite the availability of air bags for the past three years. I ask why have the air bag advocates not purchased a car with this equipment, for they certainly have had every opportunity.

Less than 100 accidents have resulted in the deployment of the air bag equipped in the above-mentioned cars. Out of those 100 deployments, there have been four fatalities and there have also been deployments when there should have been none. Arising out of those less than 100 accidents, General Motors has had 10 products liability suits filed against it. In four of those cases, it is alleged that the air bag failed to deploy. In a fifth case, it is alleged that the air bag deployed without warning, and in the two other cases the complaints allege simply that the air bag malfunctioned. The other three cases are recent cases for which I do not have specific information on the nature of the alleged malfunctions. I do not consider this to be a terribly impressive performance record, but this is what the Subcommittee report recommends that we adopt for all new cars. This system quite simply is not ready for setting a standard that will mandate its inclusion in all new cars. It needs much more work and much more field testing.

I suggest the the Federal Government should not tell the American consumer that he must pay \$350 on a device that might not work. And what if the air bag deploys either accidentally or by design, what are the costs then? This aspect of replacement of a deployed air bag has been overlooked by many of the air bag proponents. This will cost the consumer between \$600-\$900.

I say no to air bags at this time!

VEHICLE SAFETY RULEMAKING

The Subcommittee report is critical of what it concludes is "stagnation" in NHTSA's program of Motor Vehicle Safety Standards. I understand this criticism to be directed at the question of setting new

standards, because there certainly has been no stagnation at NHTSA with respect to standards when that term is used in a generic sense.

It is certainly true that in the early years of the vehicle safety program, the agency issued a higher number of standards than it has in recent years. I, for one, do not find this to be terribly strange, nor do I believe that it represents any lack of due diligence on the part of NHTSA. I say this from the position of one who has not always looked with a great deal of favor on some of the decisions made by NHTSA. It seems clear to me, however, that this decline in the number of new standards can be explained by the fact that in the early years the agency issued standards that required manufacturers to install relatively inexpensive and simple items of technology on their vehicles that yield levels of benefits on which there was general agreement between NHTSA and interested parties.

It further appears that as the agency began to formulate standards to address increasingly more complex aspects of vehicle safety performance, it became exceedingly more difficult for the agency to select appropriate performance requirements and to establish necessary test procedures.

Another effect of the more sophisticated standards has been that they require more amendments than relatively simple standards do. For example, 19 amendments have been issued to Federal Motor Vehicle Standard No. 121, a heavy vehicle brake standard, since it was originally issued in February 1971. Overall, in the last five years, the agency issued 28 new vehicle safety standards or regulations and 261 amendments to those standards.

USE OF COST/BENEFIT ANALYSIS

The Subcommittee report looks with considerable disfavor upon the use of cost/benefit analysis. As a matter of fact, it concludes that this type of analysis is not required by NHTSA's governing statutes.

My reading of the National Traffic and Motor Vehicle Safety Act of 1966 and the case of *H and H Tire Company v. Department of Transportation*, 471 F. 2d 350 (7th Cir. 1972) leads me to conclude that NHTSA is very definitely required to take into account the economic effect of its standards on the effected industry. In the *H and H Tire Case* the Seventh Circuit set aside Motor Vehicle Safety Standard 117, which established specified processing and performance requirements for retreaded pneumatic passenger tires, because it construed the statutory requirement for "reasonableness" and "practicality" to include consideration of economic effects.

Cost/benefit analysis is also a very useful tool that can be utilized in establishing agency priorities among contemplated rulemaking activities. In this fashion, the costs and projected benefits of one approach to a problem can be compared with another as a basis of selection.

CONSUMER PRODUCT SAFETY COMMISSION

Generally, I agree with the majority of the Subcommittee's recommendations with respect to the Consumer Product Safety Commission. Several of the recommendations, however, do cause concern. For example, the Subcommittee seems to discourage use of voluntary safety standards developed by trade associations and standards writ-

ing bodies. I believe that voluntary standards developed by these groups should play an integral part in the Commission's regulatory process. I would encourage the Commission to work with the standards writing bodies and industry groups to insure the wider use of voluntary standards. I would also encourage the Commission to consider promulgating these voluntary standards as mandatory standards in appropriate cases. For example, it has now been over three years since the association representing the power lawn mower industry petitioned the Consumer Product Safety Commission to promulgate as a mandatory standard for power mowers the existing industry voluntary standard. If the Commission's estimate that power lawn mowers cause 64,000 consumer injuries annually is to be believed, I point out that consumers might have been better served had the Commission three years ago promulgated as a mandatory standard (and thereby insuring universal compliance) the industry's voluntary standard. As has been stated many times, the scope of the CPSC's jurisdiction is very broad; over ten thousand consumer products are subject to regulation under the Consumer Safety Act. The Commission cannot hope to promulgate standards for more than a few of these products. Instead, the Commission must rely to a certain extent on the voluntary standards developed within industry. I fear, however, that the Commission may be discouraging the development of effective voluntary standards.

I also question the Subcommittee's Recommendation (4) that the Commission's imminent hazard authority, found in Section 12 of the Consumer Product Safety Act, be used with greater frequency and that certain products be targeted as potential candidates for action under the imminent hazard provisions of the Act. The Subcommittee apparently bases its recommendation on the fact that the Commission has used this provision only once. I do not believe that the Commission's infrequent use of the imminent hazard provisions of the Act indicates that the Commission has failed to respond to risks posed by imminently hazardous products now in the marketplace. The provision was included in the Act so that the Commission would have the authority to act quickly in emergency situations to get dangerous products off the market. To guarantee against arbitrary action on the part of the Commission, the Congress included the requirement that CPSC go to court to seek an injunction in such situations. This provision was not intended to be used as a general regulatory tool. Further, I do not believe that it is appropriate for the Commission to target particular products which are likely candidates for action under Section 12 of the Product Safety Act. Again, the purpose of Section 12 was to give the Commission authority to act in emergency situations. In any other situation, I would expect that the Commission would go through the standard-setting process spelled out in other Sections of the Act.

I note with interest the Subcommittee's Recommendation (10) that the Commission make available funds to consumer groups who wish to become involved in the standards development process. As the Subcommittee points out, experience to date has indicated that developing a safety standard can be a very expensive undertaking for the organization selected by the Commission as the successful offeror. Although I recognize the need for rigorous consumer participation in the offeror process, I do not believe that the funding provisions in Section 7(d)

(2) of the Act should be limited only to consumer groups. The great expense inherent in this process may well preclude effective participation by small trade associations as well as consumer groups. Consequently, I do not believe that these groups should be precluded from having access to any funds which the Commission may make available to potential participants in the standards development process.

I endorse the Subcommittee's recommendation that the Commission conduct a detailed and comprehensive review of how the offeror process is working. I share the Subcommittee's concern that the offeror process may not be working as Congress intended and would review with interest any legislative recommendations which the Commission may propose to improve the process.

The Subcommittee seems to be saying in Recommendation (15) that the public interest finding required by Section 30(d) of the Consumer Product Safety Act can be satisfied by using the most expeditious regulatory scheme available to deal with a risk. I am puzzled by the Subcommittee's reference to "notice and comment rulemaking", however, since the regulatory procedures under the Consumer Product Safety Act are generally more extensive than mere notice and comment rulemaking.

Further, I disagree that consideration only of the speed with which a regulation can be put into place would satisfy the public interest finding which the Commission is required to make. The speed with which the Commission could act may be one of many different factors which the Commission would be required to consider in making the public interest finding. Because a number of different factors may bear on whether it would be in the public interest to regulate under the Consumer Product Safety Act, rather than one of the other Acts administered by the Commission, Congress specifically required that the Commission solicit the comments of the public before making this finding. I do not agree that the Commission could discontinue using the Federal Hazardous Substances Act because the procedures in that Act, procedures which were specifically designed by Congress, may be time consuming.

Finally, I strongly disagree with the Subcommittee's Recommendation (16) which suggests that the Commission could in certain cases deny a hearing under Section 15 of the Consumer Product Safety Act. To support this conclusion, the Subcommittee points to Section 505 in the Food, Drug, and Cosmetic Act which also requires the "opportunity for a hearing." I believe, however, that the Subcommittee's analogy to Section 505 of the Food, Drug, and Cosmetic Act is inapposite. Section 505 and the Regulations issued thereunder set out a detailed scheme for judging the efficacy of drugs. Under Section 505, the burden is on the manufacturer to show "substantial evidence" that the drug is effective.

Further, a hearing can be denied only when the Agency finds "that the applicant has not tendered *any* evidence which *on its face* meets the statutory standards." (See *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609 at p. 620 (1973).) This is, however, an entirely different regulatory scheme than the one Congress designed in Section 15 of the Consumer Product Safety Act. Under that Act, if the CPSC has reason to believe that a product may present a substantial hazard, the Commission must hold a hearing to determine the existence of the hazard and fashion the appropriate remedy, if a hazard

is found. Because of the great variety of products subject to the Commission's jurisdiction and the wide variety of risks that might arise from those products, the regulatory scheme in effect for drugs under the Food, Drug, and Cosmetic Act and the procedures developed thereunder are clearly inappropriate with respect to the Consumer Product Safety Commission.

Further, I do not believe that Congress intended that the Section 15 hearing could be dispensed with in certain circumstances. Because of the consequences which flow from a determination that a product may present a substantial hazard, an adjudicatory proceeding was specified and, in the words of the Committee on Interstate and Foreign Commerce, "thus, before being compelled to take remedial action, manufacturers, distributors, and retailers may avail themselves of the safeguards available under the formal adjudicatory procedures of the Administrative Procedure Act." (See H. Rept. 92-1153, p. 42 (June 20, 1972).) For the Subcommittee to suggest that the Commission may declare a product to be a substantial hazard under summary judgment procedures without going through a formal hearing distorts the intent of the Congress.

Not only do I disagree that the Commission has the authority to issue such rules, I am also surprised that the Subcommittee makes this recommendation at all since the record shows that there is no need for development of summary judgment rules for Section 15 hearings. To date, the Commission has only gone through one hearing to completion. In that case the Commission was not successful in proving that a substantial product hazard existed. (See *In the Matter of White Consolidated Industries, Inc., dba Kelvinator, Inc.*, Docket No. 75-1 (Initial Decision, Nov. 3, 1975).) I would caution against giving the Commission authority to issue these kinds of rules until the Commission can show that such rules are indeed necessary to carry out its mandate.

FOOD AND DRUG ADMINISTRATOR

Before I begin my discussion of the issues in the Subcommittee's presentation with respect to the FDA, I would like to inject a personal note concerning Commissioner Schmidt. It has been brought to my attention that the Commissioner intends to resign within the next few months. I note this resignation with regret, because I believe that we are losing an outstanding public servant who has conducted his stewardship of the FDA with propriety and sound judgment. He will be very difficult to replace.

Now with respect to the report itself, I believe it ignores, in my opinion, much of the voluminous information supplied to it which would cast a totally different light on this report. Many of the worthwhile activities of FDA have not been given enough attention, such as procedural reforms and consumer activities that have been brought about under Commissioner Schmidt's leadership. Given this selective approach it was inevitable that many of the conclusions and recommendations would be as they are.

NITROFURANS

The Subcommittee report recommends that the FDA "revise its definition of its imminent hazard authority and suspend drugs when

there is a substantial likelihood that exposure . . . will cause further harm to the public even though the final results of that exposure will not be evident."

It is apparent from testimony at the Subcommittee's hearings and other actions by the Agency that FDA supports the need for legislation to revise the "imminent hazard" standard of current law. The Subcommittee on Health and the Environment is currently considering a proposal contained in H.R. 14289 which would relax the standard for summary removal of drugs whose safety is in question. It is my understanding the FDA fully supports this proposal.

This recommendation appears to be based exclusively on the nitrofurans "case study," which assumes that FDA could implement such a change without Congressional action. It further assumes that the nitrofurans could be banned immediately if only the FDA were more aggressive in applying the present law.

I agree that the Agency's delay in dealing with the nitrofurans has been excessive. However, the notices of opportunity for hearing published in the Federal Register on May 13, 1976, proposing to withdraw approval of furazolidone, and on August 17, 1976, proposing to withdraw approval of furaltadone, nitrofurazone, and nihydrazone (which the Subcommittee report fails to mention) reveal the complexity of the scientific issues which the Agency must consider and resolve. Contrary to the GAO report prepared for the Subcommittee, which makes the case against nitrofurans appear to be open and shut, those notices identify many issues which are not as yet resolved, including the threshold question of whether furazolidone is a carcinogen. According to the May 13 notice, the manufacturer is claiming that furazolidone is not a carcinogen with respect to humans, because any malignancies that have been found in test animals are the result of furazolidone's effect on the animals' hormonal system, which is different from that of man.

Scientific questions of this complexity take time to resolve; my concern is that the Agency actively pursues them, as it now appears to be doing. The May 13 notice also indicates that withdrawal of approval of furazolidone could result in an inflation impact of as much as 2.6 billion dollars annually. It would be singularly inappropriate for the Agency to make a decision which would result in this kind of economic impact until all of the scientific questions have been conclusively resolved.

Caution and observance of the orderly processes of law are especially in order when there is no evidence that residues of nitrofurans are common, widespread, or at significant levels in food, when there is no evidence that nitrofurans are harmful to humans, and when the Commissioner of Food and Drugs has assured the Subcommittee that in his medical judgment the continued use of nitrofurans pending an administrative resolution of the questions concerning their safety does not pose a threat to human health.

We do not agree that the length of time required for resolving these questions administratively automatically creates a situation in which the "imminent hazard" provision of the Act should be invoked by the Secretary. The Senate Report on the Drug Industry Act of 1962 makes clear that the imminent hazard provision was to be used sparingly: "The committee contemplates that this power would be exercised only

in the exceptional case of an emergency, which does not permit the Secretary to correct it by other means."

Even the *EDF* case, on which the Subcommittee report relies, requires a finding of "probability" of serious harm before the "imminent hazard" standard for summary suspension may be invoked. This is the kind of finding that the Commissioner is unable to make.

CONFLICT OF INTEREST

The report's discussion of conflict of interest is particularly disturbing. The report concludes that procedural problems and the employment of some employees with industry experience has tarnished the FDA's image. In fact, it is the Subcommittee's own report and selective attention to these subjects that has the potential for adversely affecting the Agency's image. More careful examination of the FDA's experience and its submission to the Subcommittee would show that:

There were no actual conflicts of interest identified by either the GAO or the Subcommittee's investigative staff. Consequently, even where FDA may have varied from its rigid procedures, it still applied sufficient safeguards to protect itself, its employees, and its decisions from any violation of the conflict of interest statutes.

The actual number of people employed by the FDA who had prior experience in the regulated industries was both small and satisfactorily explained by the Agency as necessary to obtain certain kinds of experience (such as packaging technology) not otherwise available to it. Without such knowledge among its own staff, the FDA would be a captive of the very industry it was charged by law to regulate.

PACEMAKERS

The report's discussion of pacemakers indicates a failure to comprehend the real problems with the regulation of these products. More efficient processing of recalls of products that have been surgically implanted in the human body is hardly an optimum solution. The pacemaker problem was the direct result of a lack of adequate statutory authority to regulate life-sustaining medical devices. Congress has since responded to that need by enacting the Medical Device Amendments, PL 94-295, substantially in the form proposed by the Administration, to provide FDA the authority which it has been seeking for a considerable period of time. I am disappointed the report did not acknowledge it.

ADVISORY COMMITTEES

While the report's recommendation relating to FDA's use of advisory committees would appear to be sound, it is obsolete. The recommendation implies that the Agency has not assured that its advisory committees were constituted or did not proceed in accordance with the requirements of the Federal Advisory Committee Act. The FDA operates one of the most advanced advisory committee systems in the Government, seeking to obtain the views of outside parties and to expand its scientific capability. Its former practice of permitting committees to meet in closed sessions for purposes of deliberation paralleled that of many other agencies and departments, although it has been criticized from some quarters. In mid-summer of this

year, FDA's Commissioner Schmidt announced that the Agency was changing its practice and would henceforth hold deliberative sessions of advisory committees in open session. In making this change, the FDA not only conformed its practice with the most liberal reading of current law, but it anticipated by several months the requirements of the new Sunshine Act, which will not become effective until next February. The Majority's implication that the FDA has shown indifference to the requirements of the Advisory Committee Act is therefore without foundation.

REORGANIZATION

The Subcommittee proposes that many of FDA's problems could be served by creating a new multi-member commission independent of DHEW with additional responsibility for products now regulated by the Consumer Product Safety Commission and programs now under the jurisdiction of the National Highway Safety Administration. The suggestion draws heavily on the history of the Consumer Product Safety Act, but disregards the actual experiences of the Consumer Product Safety Commission which is both a multi-member agency and independent. The Comptroller General released a 43 page report on July 26, 1976, entitled, "Better Enforcement of Safety Requirements Needed by the Consumer Product Safety Commission." This report found that the Commission "has not been timely or systematic in assuring industry compliance . . ." The GAO cited numerous, serious problems including:

Product ban . . . not enforced effectively.

Hazardous products remained on the market.

The Commission staff prepared criminal cases that were later closed without prosecution.

The Commission did not evaluate the scope and effectiveness of its compliance efforts.

The report makes similar allegations about FDA. There is no evidence that an independent Commission, much less a multi-member Commission is the panacea for the problems faced by a regulatory agency. In fact, the CPSC experience raises serious questions about this approach rather than support a conclusion that Congress should do this a second time.

PART III

DISSENTING VIEWS OF HON. JAMES M. COLLINS AND HON. ROBERT KRUEGER

FEDERAL POWER COMMISSION

We have reviewed the chapter of the Subcommittee's report on the Federal Power Commission at some considerable length. We did this because the greatest proportion of this Subcommittee's time, during this Congress, was consumed with investigations into the natural gas industry.

We were not at all surprised that the report would, in its self-styled rating system, rate the FPC very low. Any casual observer of the tenor of this Subcommittee's hearings and the topics of investigation could have predicted that the Subcommittee's report would hold this Commission in low regard. This was true with respect to the FPC under the Chairmanship of John Nassikas as it is now under Richard Dunham. As a result of our exposure to both of these gentlemen, we have found them to be truly dedicated public servants who have indeed tried their level best to perform their duties in the public interest. Our comments apply equally to Commissioners Holloman, Watt and Smith on the current Commission, and Commissioner Springer and Moody who both served with distinction until recently.

The Subcommittee's report is down on the Commission because many of the Commissioners have come to the realization that price control on the well-head price of natural gas is counterproductive, whereas the Subcommittee's Majority is still dedicated to this concept even though these controls are proving to be the cause of the growing natural gas shortage. The Majority fails to comprehend that the price of natural gas must be increased if we are to enhance gas supply deliveries, but the Commission comprehends this; therefore, the two are at odds.

We view the mandate of the Commission as being to assure adequate supplies at just and reasonable prices, and we have a very simple equation that illustrates the logic of this mandate: Just and reasonable prices=adequate supplies.

The report focuses upon the left-hand portion of this equation, and gives short shrift to the right-hand side. To our way of thinking, prices that are just and reasonable will assure adequate supply, and if supply is deficient the prices allowed are therefore not just and reasonable. It is an acknowledged fact which even the report does not dispute that there is a shortage of natural gas in this country, and this is due to the fact that the well-head price for natural gas has been set far too low. These low prices have in turn provided a direct in-

centive to use natural gas, because it is priced far below competing sources of energy. Additionally, the low prices that have in the past been set by the FPC have not provided producers with an adequate economic incentive to explore for and develop new supplies of natural gas.

The Subcommittee's report attempts to dispute the inherent logic of our position, by attempting to show that what we have not factored into our equation is the fact that natural gas producers are withholding gas from the market to bring pressure on Congress to deregulate in anticipation of higher prices. The Majority then in an effort to make their case for continued regulation is attempting to find a scapegoat in an effort to justify their illogical position. Only a few weeks ago, we would have said that another argument the Majority would use against our position is that the natural gas producing industry is a monopoly. Even they now admit that it is not. Additionally, the Senate had these withholding charges before it when it considered S. 2310 which would have deregulated the well-head price for new natural gas, and still passed this bill by a vote of 58-32. We assume, therefore, that the Majority would also condemn the Senate for its action.

One must have already accepted in advance the notion that producers are withholding if one is to accept the report's case studies as proving that point, because once *all* of the facts are presented about these situations, these allegations must be considered by the reasonable observer to be unfounded. The Subcommittee Majority had to find a scapegoat so they were predisposed to making the withholding case. They in turn ignored all facts that militated against their position, and massaged and forced the remaining facts into a juxtaposition that would help their position. As we all know, forcing a square peg into a round hole is not easy.

It is interesting for us to note that the Subcommittee chooses this moment in time to condemn the FPC just as it is beginning to make real progress in combatting the natural gas shortage. This is at a time when the Commission has awakened from its twenty-year slumber by coming into the real world and realizing that additional supplies of natural gas could not be produced for 52¢ per mcf. Up to this time, the Commission has been derelict in its responsibility for insuring adequate supplies of natural gas by its short-sightedness. This short-sightedness caught up to America in 1973, and pipelines started experiencing massive curtailments in their supply of natural gas.

We would like to trace from an historical standpoint how this country got into such a serious natural gas shortage problem. This historical foray will serve to illustrate our point that it is only now that the Commission has begun to recognize and remedy its lack of vision in the past.

In the fall of 1960 the Federal Power Commission reached the conclusion that its efforts to determine producer rates on a company-by-company basis, based on the same type of cost-of-service approach used for pipeline companies, was administratively impossible. The Commission's dockets were swamped with thousands of cases, and in the six years since the Commission was determined to have jurisdiction over producer sales by the Supreme Court in 1954, the Commission had decided only two producer rate cases.

Therefore, the Commission turned to establishment of producer rates on the basis of a producing area. At that time the Commission Staff and other parties representing consumer interests advocated the use of an average industry-wide unit cost of service to establish a ceiling rate for producers in each producing area. Natural gas producers strongly opposed this approach, contending that the imposition of an average unit cost of service would prevent the exploration for, and development of, gas projects which were expected to cost above the industry-wide average. The producers stated repeatedly in their evidence in the area rate proceedings that failure to allow producers to recover their "marginal cost" or the cost of the higher-priced projects, either as reflected by marginal cost studies or by the marketplace (which by economists' definition automatically equates itself to the marginal cost) would inevitably result in adequate gas supplies for the United States over the longer term.

Throughout the 1960's, however, the Federal Power Commission rejected these arguments on the theory that supplies of gas were ample and that the producers should be held down to the "lowest reasonable" price based on an average historical industry-wide unit cost estimate. These estimates, initially based on test years of 1960 and 1962, fell farther and farther behind the continually increasing actual cost of finding new gas reserves. Because the gas producing industry was so huge and complex, however, and because of the fact that the United States had built up by 1960 proved reserves in excess of 260 trillion cubic feet, the result of these policies was not immediately apparent. This is because gas already discovered will continue to be developed. Even though the price is much less than would be required to initiate the project from its inception, the trend in reserve discoveries continued to increase until 1966. With the FPC *Permian* decision in 1965, and the affirmance by the Supreme Court of that decision in 1968, the incentive for exploration and development was substantially reduced.

The result of this decision was a decline in reserve discoveries beginning in 1968 (except for one year, 1970, when the Prudhoe Bay reserves were added) so that in every year since 1968 the reserves added have been approximately one-half of the reserves being produced.

Still, the impact of the Commission's policies was not readily apparent to the consumer, because the production statistics remained at high levels, as the pipelines continued to purchase gas from reservoirs already discovered. It was not until about 1973 that the pipelines began severe curtailments to their customers, because as production from the older fields declined there were insufficient new fields being added to replace them.

In order to understand the charges and allegations being made by the report today, it is also important to trace the position of the Federal Power Commission, responsible pipeline and distribution companies, Public Utility Commissions, and the extremist industry critics over this time period.

Throughout the 1960's the FPC remained skeptical of the producers' arguments that the FPC policies would lead to gas shortages. But beginning in 1969 and 1970, the FPC became alarmed by the fact that the reserve additions were only about half of the gas being produced. In the area rate cases pending before it at that time, involving Southern Louisiana, Other Southwest, and Texas Gulf Coast, the FPC sent its

auditors and investigators into the producers' offices and made spot checks of various reserve figures. It called to the witness stand the Chairman of the AGA Reserves Committee and subjected him to interrogatories and cross-examination. As a result of these investigations and studies, the FPC concluded that the reserve estimates were reasonably accurate, that the shortage was real, and that steps should be taken to attempt to alleviate the shortage. Because of the precedents established in the 1960's however, the Federal Power Commission was reluctant to abandon ceiling rates based on industry-wide unit cost studies. Therefore, it continued to ground its ceiling rates on an average unit cost basis in all of the area rate decisions which were issued in the early 1970's.

The result of this action was to continue producer ceiling rates at price levels which were far below, and becoming increasingly farther below, the marginal cost of finding new gas which increased at a much more rapid rate than the increases in the producer ceiling prices.

Throughout the 1960's the gas distribution and pipeline companies made major efforts in the area rate proceedings to hold the producer prices to the average unit cost figure. When the results of this FPC policy began to be apparent in 1969 and 1970, a number of these companies went to private geological consultants and made their own surveys to determine whether the gas shortage was real. These independent geological consultants assured these companies that the shortage was real and could be expected to get worse if the producers were not permitted to recover their replacement costs of finding new supplies. Responsible managements in most of these companies then realized that although the effect of the FPC policy was lower prices for the near term, the long-range effect of the FPC policy would be increasing gas shortages and sharp price increases, which would have to be greater the longer they were deferred. Therefore, these companies came into the FPC proceedings and advocated price increases, in order to attempt to bring the supply and demand into balance.

At the extreme end of the spectrum in producer rate cases appeared a group of self-acclaimed "consumer advocates" who viewed the producing industry with extreme suspicion. It is these groups which have continued the skepticism of the 1960's into the shortage conditions of the 1970's. Although all responsible segments of the industry, all government agencies, and independent economists which have taken the trouble to thoroughly investigate the problem have become convinced that the gas shortage is real and that it is caused by short-sighted ratemaking policies of the FPC, these groups have insisted that the shortage is a result of some monstrous and gigantic conspiracy conceived and carried out by the producing industry. These so-called consumer advocates, as is the Subcommittee Majority, have been undeterred by the fact that their charges have been disproven time and again before the FPC.

Before passing on directly to the Subcommittee's case studies and recommendations, we believe that we must comment upon two additional assertions made in the report in its discussion of the Commission's mandate. First, in a further attempt to justify regulation of the well-head price the report states:

The appropriate extent of Federal regulation over the *natural gas industry* is a subject of dispute. Although natural gas producers are not legal monopolies

(e.g., licensed), the industry is dominated by large producers which are generally integrated vertically . . . (Emphasis added)

We hasten to point out to the Subcommittee Majority that the natural gas industry is not integrated vertically as in oil. This industry with few exceptions is composed of three distinct segments which are:

- (1) Producer
- (2) Pipeline
- (3) Distributors

Exxon, Texaco, Gulf, etc. sell their gas to non-affiliated pipelines which in turn sell it to non-affiliated distributors. This is by no means vertical integration. To illustrate this point, we call the Majority's attention to their own case studies. In the Mobil-Grand Isle 95 case for instance, Mobil, the producer, was selling its gas to Trunkline, the pipeline which would in turn sell it to its distributor customers. To have vertical integration, Mobil would have had to have been selling to a Mobil affiliated pipeline with the pipeline selling to a further affiliated distributor. This is quite simply not the case.

The second point that we are required to comment on is the following statement in the report:

This inconsistency between the law and the FPC's predilections has produced a series of judicial decisions over-ruling Commission actions not in keeping with the concept of cost-balanced regulation as mandated by the Natural Gas Act.

This statement amply illustrates the point that we made earlier in these views that the Majority will ignore those facts which militate against their position. What the report fails to bring out is that the Commission has been upheld by the courts in every area and national rate proceeding. These are the most important cases, and in these cases the FPC has indeed a record of success as Table I which follows illustrates:

New gas rate opinion	New gas rate (cents per Mcf)	Production or severance tax component	Gathering component	Rate less production tax and gathering
1. Statement of General Policy, No. 61-1, 24 FPC 818 (1960)	14-21	0	0	14-21
2. Permian Basin Area Rates, (Permian I) Opinion No. 468, 34 FPC 159, rehearing denied, Opinion No. 468-A, 34 FPC 1068 (1965), affirmed, In re Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	16.5	1.0	0	15.5
3. Southern Louisiana Area Rate Proceeding (SOLA I), Opinion No. 545, 40 FPC 530 (1968), amended by Opinion No. 546-A, 41 FPC 301 (1969), rehearing denied, 41 FPC 616 (1969), affirmed, Southern Louisiana Area Rate Cases v. FPC, 428 F. 2d 407 (5th Cir.), cert. denied, Public Service Commission of New York v. Amerada Hess Corp., 400 U.S. 950 (1970)	20	1.5	.51	17.99
4. Hugoton-Anadarko Area Rate Proceeding, Opinion No. 586, 44 FPC 761, rehearing denied, 44 FPC 1434 (1970), affirmed, In re Hugoton-Anadarko Area Rate Case v FPC, 466 F. 2d 974 (9th Cir. 1972)	19-20.5	0	0	19-20.5
5. Appalachian & Illinois Basin Area Rates (Appalachian-Illinois), Order No. 411, 44 FPC 1334 (1970), rehearing denied, Order No. 411-B, 44 FPC 1334 (1970), rehearing denied, Order No. 411-B, 44 FPC 1487 (1970). Subsequent interpretation, Opinion No. 639, 48 FPC, 1299 (1972), affirmed, Shell Oil Co. v. FPC, 491 F. 2d 82 (5th Cir. 1974)	23.5-32.75	(c)	0	23.5-32.75
6. Texas Gulf Coast Area Rate Proceeding (Texas Gulf Coast) Opinion No. 595, 45 FPC 674, rehearing denied, Opinion No. 595-A, 46 FPC 827 (1971), remanded, Public Service Commission, State of New York v. FPC, 487 F. 2d 1043 (D.C. Cir. 1973), remanded, Mobil Oil Corp. v. FPC, 417 U.S. 964 (1974), affirmed Public Service Commission, State of New York v. FPC, 516 F. 2d 746 (D.C. Cir. 1975)	24	.99	.4	22.61

New gas rate opinion	New gas rate (cents per Mcf)	Production or severance tax component	Gathering component	Rate less production tax and gathering
7. Rocky Mountain Area Rates (Rocky Mountain) Order No. 435, 46 FPC 68 (1971), modified, 46 FPC 620 (1971), rehearing denied, 49 FPC 1279 (1973), affirmed, American Public Gas Ass'n v. FPC, 498 F.2d 718 (D.C. Cir. 1974)	22.5-24	(?)	0	22.5-24
8. Southern Louisiana Area Rate Proceeding (SOLA II), Opinion No. 598, 46 FPC 86 (1971) rehearing denied, 46 FPC 633 (1971), affirmed, Placid Oil Co. v. FPC, 483 F.2d 880 (5th Cir. 1973), affirmed, Mobil Oil Corp v. FPC, 417 U.S. 283 (1974)	26	2.3	.51	23.19
9. Other Southwest Area Rates (Other Southwest) Opinion No. 607, 46 FPC 900 (1971), rehearing, Order No. 607-A, 47 FPC 99 (1972), affirmed, In re Other Southwest Area Rate Case (OSWA), 484 F.2d 469 (5th Cir. 1973), cert. denied, Mobil Oil Corp. v. FPC, 417 U.S. 973 (1974)	22.5-26	(?)	1-1.5	21.5-24.5
10. Area Rate Proceeding (Permian II), Opinion No. 662, 50 FPC 390, rehearing denied, Opinion No. 662-A, 50 FPC 932, motion for reconsideration denied, 50 FPC 1250 (1973)	35	0	0	35
11. Just & Reasonable National Rates For Sales of Natural Gas, Opinion No. 699-H, 52 FPC 1604 (1974), affirmed, Shell Oil Co. v. FPC, 520 F.2d 1061 (1975), rehearing denied, 525 F.2d 1261 (5th Cir. 1976), cert. denied, 96 S. Ct. 2661 (1976)	50	0	0	50
12. National Rates for Jurisdictional Sales of Natural Gas Dedicated to Interstate Commerce on or after January 1, 1973, for the Period Jan. 1, 1975 to Dec. 31, 1976, Opinion No. 770, Docket No. RM 75-14 (July 27, 1976)	142	0	0	142

26.8 cents for West Virginia.

² Rates includes a production of severance tax.

CASE STUDIES

A. The FPC's failure to enforce the delivery obligations of natural gas producers

This discussion in the report would have us believe that there is such a thing as a "fixed-minimum daily contract requirement" in gas sales contracts between producers and pipelines. This is true only for warranty contracts.

The report quotes Chairman John Nassikas and an FPC Deputy General Counsel to the effect that there is such a thing as a fixed-minimum daily contract requirement, but then goes on to say the following:

Warranty contracts are rare. Normally, natural gas sales contracts do not contain a stated daily delivery volume. (Emphasis added)

The report, thus, recognizes the distinction between a warranty contract, which is not only rare but extremely rare, and the typical gas sales contract, but would still hold the latter to some firm daily delivery obligation. It appears to me that the Majority is under the same fundamental misconception as the Commission was prior to the issuance of Order No. 539. This explains the quotes from Chairman Nassikas and the FPC Deputy General Counsel on this point. The Commission, to its credit, reversed itself on this question because it came to the realization that there is no such thing as a fixed-minimum daily contract delivery obligation, thus, Order No. 539-B.

The confusion in this area results from the language in the standard gas sales contract which mentions the words "Daily Contract Quantity (DCQ)." This language has been interpreted evidently by the Majority and formerly by the FPC as stipulating a fixed-minimum daily

contract requirement. This is not so, and we will attempt to explain in the most concise terms possible why this is not so, as well as explaining how this language developed in the natural gas industry.

In earlier years in this industry, there were more than ample supplies of natural gas, and it was the producer who was attempting diligently to sell his gas. The pipelines, on the other hand, did not have the demand necessary to take all that the producer could deliver. The pipeline demands were large during the winter heating season, but very light during the summer months. The producer, however, had a year-round obligation to their lessor as the typical oil and gas lease requires the lessee to diligently produce the property. Given these countervailing considerations, the parties developed what is known as a "take or pay clause." Some "take or pay clauses" involve reference to a specified percentage of the delivery capacity (delivery capacity contracts) of the wells on the dedicated acreage, while others involve reference to the "recoverable reserves" under the contract (reserve ratio contracts).

The obligation of the pipeline under these "take or pay" provisions is to take from the producer a certain percentage of the estimated reserves under a reserve ratio contract or a stated percentage of the delivery capacity of the dedicated acreage under the delivery capacity contracts. If the pipeline did not take what it agreed to take, then it was required to pay for the volume not taken or some specified percentage of the volume not taken. Thus, we have the "take or pay" contract.

The logic of those who say that even these types of contracts specify a fixed-minimum daily delivery obligation on the producer runs like this: if the pipeline is obligated to "take or pay" for a specified "DCQ", then the producer, conversely, must be obligated to deliver what the pipeline is required to take. This at first blush appears to be very logical even as we have explained the nature of the "take or pay" type contract. The typical contract must, however, be scrutinized further to determine what is the producer's actual legal obligation.

The next step in our review should be to take a look at some actual language from the standard gas sales contract. The following is language from what we have determined to be a typical delivery capacity contract, which contract in its entirety is attached hereto as Appendix I:

(h) The term "Seller's delivery capacity," as used herein, shall mean Seller's pro rata part of the maximum amount of gas well gas which can be withdrawn in any one day from the lease, under applicable rules and regulations and in accordance with prudent operating practices, and which is available for delivery at the delivery points provided for in this Agreement at the pressure required by Section 8 hereof. (Emphasis Added)

* * * * *

(3) Quantity: During each year Seller agrees to sell and deliver to Buyer, and Buyer agrees to purchase and receive all of Seller's share of the following quantities of gas produced from the lease; provided, however, that in the event said quantities which are available are not taken, Buyer agrees to pay for said quantities not taken. (Emphasis Added)

(a) Commencing on the date of first delivery hereunder and continuing for a period of five (5) years thereafter, a quantity of gas equal to ninety percent (90%) of Seller's delivery capacity, such delivery capacity to be determined by Seller in the conduct of periodic tests as hereinafter set forth. (Emphasis Added)

(b) Commencing five (5) years from the date of first delivery and continuing throughout the term of this Agreement, a quantity of gas equal to eighty-five

percent (85%) of Seller's delivery capacity, such delivery capacity to be determined by Seller in the conduct of periodic tests as hereinafter set forth. (Emphasis Added)

(c) Buyer shall have the right to purchase, and Seller will sell and deliver to Buyer, such additional quantity of gas per day as Buyer may from day to day elect to purchase up to a total quantity equal to the smallest of the following quantities:

(i) Seller's pro rata part of the total quantity *which the wells are capable of producing* when produced at their maximum efficient rates of flow; or (Emphasis Added)

(ii) Seller's pro rata part of the total quantity *which the wells are capable of producing* when produced at their respective allowable rates of flow under applicable orders, rules, regulations or laws; or (Emphasis Added)

(iii) Seller's pro rata part of the total quantity equal to all casinghead gas and a quantity of gas well gas equal to *Seller's delivery capacity*. (Emphasis Added)

(d) The gas purchased hereunder shall be delivered and received as nearly as practicable at uniform hourly and daily rates of flow. *The daily quantity of gas actually delivered and taken may vary ten percent (10%) above or below the quantity requested by Buyer to be delivered hereunder, but in no event, however, shall the total quantity delivered and taken during any month vary more than five percent (5%) above or below the total quantity requested by Buyer to be delivered hereunder for such month.* (Emphasis Added)

* * * * *

(g) Seller's delivery capacity on each day of the period between the effective date of any two (2) consecutive tests thereof shall be considered to be the same as Seller's delivery capacity determined by the first of such two (2) tests. *If on any one day Seller fails to deliver for any reason except force majeure the quantity of gas well gas requested by Buyer (normal dispatching variations, not to exceed five percent [5%] excepted), then the quantity of gas well gas actually delivered on such day shall be deemed to be Seller's delivery capacity for the duration of such failure.* Buyer agrees to notify Seller of the failure of Seller to deliver the quantities so requested as soon as practical after Buyer learns of such failure in the course of Buyer's normal and customary operating procedures. (Emphasis Added)

As the careful observer will note, every reference in this contract is pegged to the capacity of the wells to produce and not to any fixed quantity of gas. Delivery capacity is initially determined by tests, and, again, the uninitiated could jump to the conclusion that this is the fixed amount they have been talking about all along. We call your attention, however, to Section 3(g) of the contract which provides that delivery capacity cannot exceed the amount actually delivered. This differs substantially then from the warranty type contract which does set a fixed-minimum daily contract requirement for delivery, because this contract is based on the ability of the wells to produce.

Now for a look at the reserve ratio type contract. We will quote the relevant portions of the contract below and attach it in full as Appendix II:

Article IV—Quantity

1. *Seller agrees to sell and deliver to Buyer and Buyer agrees to purchase and take from Seller hereunder or pay Seller for, whether taken or not, during each accounting year an average daily quantity of gas attributable to Seller's interest committed hereunder, equal to one million (1,000,000) cubic feet for each seven billion three hundred million (7,300,000,000) cubic feet of reserves as established under Article III hereof, and adjusted as hereinafter set forth, provided Seller is able to develop and maintain a daily deliverability equal to one hundred twenty-five (125) percent of such average daily quantity. If the volume of reserves shall either increase or decrease as a result of any determination made in accordance with Article III hereof, said daily quantity of gas shall be adjusted in accordance with the above provisions of this Section 1. Subject to the other provisions of this Article IV, so long as allowables are set for wells, Buyer further agrees to nominate in the aggregate for each*

yearly period at least one million (1,000,000) cubic feet daily for each seven billion three hundred million (7,300,000,000) cubic feet of the aggregate net recoverable gas reserves committed hereunder. For all purposes in connection with the obligations of Seller to deliver and Buyer to take gas hereunder, net recoverable reserves as of any determination under Article III hereof shall be adjusted by adding thereto the total gas delivered hereunder to date of said determination from the acreage for which determination was made. Notwithstanding the provisions set out in this Section 1 to the contrary, during the first 60 months from the date of initial delivery hereunder, the average daily quantity for this Agreement shall be either the aggregate volume obtained when adding the results of multiplying Seller's interest committed hereunder in each well connected by Buyer times two million (2,000,000) cubic feet or one million (1,000,000) cubic feet for each three billion six hundred fifty million (3,650,000,000) cubic feet of reserves as established under Article III hereof, whichever is the greater. (Emphasis Added)

2. *Except as permitted by Seller, Buyer agrees that its take of gas hereunder during any one day shall never be less than seventy-five (75) percent nor more than one hundred twenty-five (125) percent of the average daily quantity set forth in Section 1 above.* (Emphasis Added)

3. *Should Seller be unable to develop or to maintain for a period of thirty (30) days a deliverability equal to one hundred twenty-five (125) percent of the average daily quantity set forth in Section 1 above, then in that event said average daily quantity shall be reduced to eighty (80) percent of the deliverability which Seller is able to develop and maintain; provided, however, that Seller shall have the right at any time to re-establish an average daily quantity based upon the rate of taking provided for in Section 1 above by restoring deliverability equal to at least 125 percent thereof.* (Emphasis added)

Thus, under this type of contract, the seller has agreed to deliver 125 percent of the "average daily quantity", which is initially established at 1mmcf of gas for each 7.3 bcf of reserves. If the seller, however, cannot meet the 125 percent daily deliverability requirement, then it is reduced under the contract to *80 percent of actual deliverability*.

We trust that this discussion has dispelled any notion of a "fixed-minimum daily contract requirement" in "take or pay" type contracts. The delivery obligation of the producer has a direct correlation to the ability of the wells to produce. The delivery obligation can vary and as such is not fixed for neither the delivery capacity type nor the reserve ratio type contract. These contracts were negotiated, bear in mind, by those persons most knowledgeable about this industry—the pipeline and the producer. Both of them recognize the nuances and vicissitudes of the production end of the business. They know that there are many uncertainties and variables which are simply unknown at the time a project is begun. Producers, as such, simply do not, except in warranty type contracts, guarantee a certain performance standard.

In taking a contrary position, the Majority ignores the fact that gas sales contracts are entered into between producers and pipelines shortly following the discovery of the reserves dedicated to the contract, or in other words, prior to the significant development of those reserves. At this time, neither party can with any degree of exactitude predict the amount of reserves in question nor the delivery capacity of the wells.

Even if one concedes the point that the standard contract does not call for a fixed-daily delivery requirement, one could still, we suppose, say that producers were not meeting the delivery obligations in the contract even under the standards that we have outlined. If they were to raise that argument, we would ask for proof. What evidence is there that producers are not living up to their delivery obligations under the contract? We would also ask why the pipelines have not sued the

producers. The answer to that question, we think, is clear—the pipelines do not have a cause for action, and producers are meeting the contractual obligations. The Subcommittee has produced no evidence to the contrary. We feel certain that given what they know now those at the Commission would not agree with the Subcommittee report that standard gas sales contracts have minimum delivery obligations. The four cases mentioned in the Subcommittee report do not offer support for that conclusion.

CITIES SERVICE—SOUTH BRAZOS BLOCK A-76

The first case mentioned is Cities Service—Block A-76 which the report indicates in bold-face print was a Subcommittee report, but in the fine print of the footnote acknowledges that it was not a Subcommittee report, but a staff report. This staff report was never put to a vote of the Subcommittee, nor was there any opportunity for minority, dissenting or additional views.

The substance of this “staff” report dealt with the shut-down of Cities Service’s South Brazos Tract, A-76, for the purpose of making pipe repairs on its gas producing wells. The record of the hearings left no doubt that the workover was necessary. The question then was the timing of the workover. Could it have been done in the summer? Could it have been commenced prior to August 30, 1974? In making this determination, there were two principal issues. One, whether or not a suitable workover rig was available, and two, whether Cities Service had the tubing necessary to perform the workover.

With regard to the workover rig, the Subcommittee staff report indicated that Rig 51, owned by Dresser Offshore Service, Inc., was available and suitable to perform a workover. Mr. Oliver of Cities Service testified before the Subcommittee that Rig 51 would not fit the platform and it would take a major operation to remove production equipment from Cities Service platform to accommodate Rig 51. Mr. Oliver further testified that it would take a one month period of time in order to accommodate Rig 51, and during the month, production from A-76 would have to be completely curtailed.

The Subcommittee’s staff contacted three persons: Mr. Paul Vernon, with Progress Marine, Inc.; Mr. Robert Whittaker of the U.S. Geological Survey; and Mr. Rene Joffroin of Harvey Fabricating Division, who indicated that it would take between three and five days to remove the production equipment on A-76 and accommodate Rig 51. Mr. Whittaker and Mr. Joffroin never went to the Cities Service platform to evaluate the time needed to accommodate Rig 51, but used photographs of the A-76 platform to make their judgments. The conclusions of Messrs. Vernon, Whittaker, and Joffroin have been disputed by a study made by Brown and Root, a leading engineering firm, which indicated that it would have taken 25 days to make Rig 51 suitable. Brown and Root’s study is consistent with Mr. Oliver’s testimony. This study of the matter indicated that one of the pieces of production equipment that would be required to be removed in order to use Rig 51 weighed 185 tons. Brown and Root was fully knowledgeable concerning A-76’s platform in that they installed the equipment on this platform. Brown and Root was also fully familiar with Rig 51.

With regard to the availability of tubing, it is an established fact that tubing was in scarce supply during the summer of 1974. Cities

Service needed a large quantity of 31½" pipe, but were never able to acquire all the 31½" pipe that they needed. Cities Service was required to substitute 31½" pipe with 27½" pipe for which they were required to pay a premium price, because they were attempting to work the platform over as fast as possible. Additionally, in spite of the fact that the workover was not commenced until August 30, 1974, the six Cities Service wells continued to produce gas at very high volumes. Cities Service was also advised by their pipeline by letter of April 19, 1974, that it had no slack demand periods, and thus, needed all of the gas it could get whenever it could get it. Cities Service relied on this letter in making their workover planning decisions.

The staff report of the Subcommittee indicated that shut-downs such as A-76 had "the effect of intensifying pressure on Congress for deregulation." There is not a scintilla of evidence that the decision concerning when to perform the workover was made for the purpose of intensifying pressure on Congress for deregulation. This same staff report also indicated "the only way Cities Service could substantially improve the price of gas would be through decontrol." The gas flow and gas price from Cities Service Block A-76 would have been completely unaffected by Federal decontrol. Cities Service has a 20-year contract with Transcontinental Pipeline to supply gas from this block at a price range from 23¢ to 29¢ per Mcf. This contract and its price would have been completely unaffected by decontrol. The price of gas was not a factor. Cities Service made a good faith effort to perform their workover as expeditiously as possible.

MOBIL.—GRAND ISLE 95

Mobil Oil Corporation's Grand Isle 95 experiences are used as an example of a producer intentionally withholding gas by delaying its application for and acceptance of an FPC certificate. Under existing law, a producer may not lawfully commence sales in interstate commerce without first getting an FPC certificate. The report implies that this statutory requirement is some sort of loophole for withholding gas supplies, and we are led to infer that producers commonly withhold gas by delaying certificates and acceptances. Any rational and objective analysis of the facts show that the report's assertions about what the Grand Isle 95 experience discloses about the conduct of Mobil and other producers is absurd. We submit that Mobil's Grand Isle 95 certificate case is the saga of a producer's unsuccessful efforts to get a large gas field on production quickly and to cut through governmental red tape, inaction, and indecision. In deciding whether Mobil's actions demonstrated an intent to delay certification and thereby intentionally withhold gas, one must answer the following questions:

(1) If Mobil intended to withhold this gas, why did it develop this field so quickly? Why was it ready to produce before all but one other field purchased in the 1972 lease sale and the first one submitted to the FPC requiring specific certificate action

(2) Why did Mobil on March 10, 1975, apply for an FPC certificate 6 days after it signed a contract to sell gas to Trunkline if it wanted to delay getting this gas on production?

(3) If delay was its objective, why did Mobil urge prompt FPC action in its certificate application so that necessary pipeline facili-

ties could be built during the Gulf of Mexico construction season so that gas could be delivered that winter?

(4) Why did the FPC, in March 1973, approve a Mobil certificate application to commence sales to United Gas Pipeline—an application that was virtually a mirror image of the certificate application in the Grand Isle 95 case, but not approve the Grand Isle 95 application?

(5) Why did the FPC delay any action at all on this application for 4 months and then act only by asking for some additional information it had never required in the past? Did this application fall between chairs? Did it get lost or forgotten?

(6) If Mobil wanted to delay, why did it supply the requested information the next week and again re-urge prompt FPC action?

(7) Why did the FPC wait 6 months to offer a certificate totally unlike the one requested and which, if accepted, would force Mobil to drop three contract rights the FPC had been routinely approving?

(8) If Mobil wanted to delay why did it respond offering to drop two of these contract rights if only the FPC would issue a certificate before September 5, 1975, the last day Trunkline said it could begin laying necessary pipeline facilities?

(9) Why did the FPC wait until after September 5, 1975, to respond to this request and then refuse to issue a certificate unless Mobil waived the third contract provision as well—the ten year term? Does the timetable of FPC action disclose an FPC effort to get this gas on production that year? Why did the FPC wait until the last minute and then engage in brinkmanship with so much gas at stake?

(10) Was it responsible for the FPC to change its mind as to the Mobil contract and say that even though more than half the certificates filed that year sought terms of less than 20 years, Mobil had to have a 20-year term in order to begin deliveries?

(11) If that FPC position was responsible, why did it reverse itself 2 months later and say Mobile could have a 10-year term? Why didn't it make the offer September 5?

(12) If Mobil's original position was unreasonable and designed to intentionally delay production, why did the FPC reverse itself and on June 29, 1976 in *Getty Oil Co. et al. CI 75-319 et al.* and again in *Superior Oil Co. et al. CI 74-734 et al.* hold that permanent certificates with all three conditions sought by Mobil were perfectly acceptable?

Mobil's Grand Isle 95 experiences do not indicate an intent to withhold gas through a producer delaying a certificate proceeding. It is grotesque to cite this case as support for an effort to extend the demonstrably cumbersome and counter-productive FPC regulatory proceedings further than they already extend.

EXXON/QUINTANA—GARDEN CITY FIELD

The question in the investigation of deliverability in this field was whether or not Quintana, the operator, should have drilled additional wells as recommended by its pipeline, Columbia Gas, and whether or not the drilling of those wells would increase deliverability from the field. The new wells recommended by Columbia contained small reserves for which there was no economic incentive to drill as the following exchange between the Subcommittee Minority Counsel and Mr.

Donald Keller of Quintana from the September 5, 1975 hearing indicates:

Mr. WUNDER. Would it be a fair statement then that those areas that have not yet been drilled contain small reserves for which you have to spend a substantial amount of money to recover those reserves and that considering the price that you are now receiving, it would be uneconomic for you to so drill?

Mr. KELLER. That is correct.

Both Columbia and Quintana witnesses testified that even the drilling of new wells in this field would create risks, and possibly lose some of the gas that is already in place. We will first quote the Columbia witness Mr. E. C. Gimblet in a colloquy with the Subcommittee's Minority Counsel:

Mr. WUNDER. Are there any risks involved to this field by drilling new wells? Would you risk losing some of the gas that is already placed by drilling the wells? This is an older field, it was in production prior to 1963. As the field gets older it becomes more risky to drill new wells in older fields?

Mr. GIMBLET. Let's see. More risky to drill new wells in older fields, and I presume that you are referring to the fact that the pressure in certain places would be low and that you would lose circulation?

Mr. WUNDER. Right.

Mr. GIMBLET. There would be some risk here in this field.

Mr. WUNDER. So for the wells that you recommended drilling there would be some risk?

Mr. GIMBLET. There would be risk.

Mr. WUNDER. How would you characterize the risk—large, small, high, low, or could you?

Mr. GIMBLET. I would be reluctant to. The operator is in a better position to judge the mechanical problems that he is going to be experiencing in that field than I am. *We are dealing with an abnormal pressured reservoir and there are a number of hazards there.* (Emphasis Added)

Mr. WUNDER. Abnormal in what respect?

Mr. GIMBLET. The pressures are above that that we normally find which is equivalent to the weight of a hydrostatic found in salt water.

Mr. WUNDER. So in fields where there is abnormal pressure it becomes even riskier to drill the wells; is that what you are saying?

Mr. GIMBLET. That is correct.

Now for Mr. Keller of Quintana on the same issue of risk to the field:

Mr. WUNDER. In a field like Garden City are there substantial risks in even drilling new wells?

Mr. KELLER. That is correct. The Garden City field is an abnormally pressured field, the sands have declined from 13,000 to 14,000 psi to about 6,000 psi but the sediments above and below these sands are still pressured at the original pressure. Consequently the drilling problems in drilling the well now has caused the cost of these wells to go from \$800,000 five or six years ago to something like 1 million 3 thousand.

The Subcommittee report placed heavy emphasis on the evaluations of the production and deliverability made by the technical staff of Columbia Gas. These evaluations reflect Columbia's belief that greater deliverability could be achieved from the Garden City field if more wells were drilled. What the report failed to point out with respect to the conclusions reached by Columbia Gas personnel and what Columbia's testimony reveals is that when making the recommendations that more wells would increase deliverability, Columbia did not take into account the economic factors which a producer must consider prior to embarking on a new capital project. Columbia's evaluation of the field was then simply that there were reservoirs in this field in which gas was to be found and which if drilled could

produce gas. Columbia by their own admission did not take into account whether or not it was economically prudent for the producer to drill the wells that they recommended drilling. Columbia did not have the economic information available to them to make such an analysis. Mr. E. C. Gimblet of Columbia Gas admitted during the following line of questioning that Columbia did not take economic factors into consideration when they made their estimate:

Mr. WUNDER. Mr. Gimblet, you testified that the economics of drilling new wells may be imprudent for Quintana. Is that the substance of your testimony?

Mr. GIMBLET. Restate the question.

Mr. WUNDER. One of the reasons why Quintana may not have drilled new wells in the Garden City field was that the economics of drilling these wells would be imprudent?

Mr. GIMBLET. That was the substance of my statement and I made the assumption that the economics may not be of such a nature that it would be prudent to drill additional wells.

Mr. WUNDER. In what respect?

Mr. GIMBLET. *The wells may cost too much to improve the delivery of gas in the near term.* It is possible that the wells that are already drilled over an extended period of time may produce oil or gas. Now, the operator would need to determine just how many additional wells he could afford to develop or drill to improve the delivery capacity of the field. *I did not have the economic information to make such an analysis.* (Emphasis Added)

Mr. WUNDER. *So your judgment about drilling new wells was done strictly on the basis that you knew that there were certain reservoirs that had gas and could be drilled without taking into account any of the economic justification for drilling the wells by the operator?* (Emphasis Added)

Mr. GIMBLET. *That is correct.* (Emphasis Added)

Mr. WUNDER. So solely from a production standpoint and leaving economics totally aside, would that be your opinion?

Mr. GIMBLET. That is correct.

So on the basis of this type of testimony, the Subcommittee report on Garden City recommended that the wells should have been drilled anyway. The economics of drilling new wells was evidently irrelevant. The risk to the field was also irrelevant to the Majority. We did not then, nor do we now, consider these factors to be irrelevant.

BASTIAN BAY—TENNECO/GETTY

The issue in this case is not unlike the one in Garden City, that is: Whether or not additional wells should have been drilled in this field. When the Subcommittee investigated this field in September 1975, the field was already at least 73% depleted according to the testimony of officials from both Tenneco and Getty.

There was a dispute in this case between Getty and Tenneco when Getty was desirous of drilling some new wells. Tenneco objected to drilling additional wells in the locations recommended by Getty because, as the testimony before the Subcommittee revealed, Tenneco feared that drilling new wells in this largely depleted old field would cause damage to the field, and in fact lose gas reserves that were in place. Mr. David Freeman of Tennessee Gas made this point succinctly in the following exchange before the Subcommittee:

Mr. WUNDER. Could this field be accelerated at a higher rate without risk?

Mr. FREEMAN. The field is just old and I doubt that there is very much that can be done to make any dramatic accelerations in the rate that this field is being depleted at this point.

Mr. R. S. Singer of Tenneco also addressed himself to the question of possible damage to the field if a well were drilled in the "V" sand

which is the only well for which Getty made a specific proposal that was rejected by Tenneco.

Mr. WUNDER. Would you be amenable to drilling in that location?

Mr. SINGER. No, sir. We still hold the reserves will be produced by the well that goes through the particular sand and is presently producing from a lower sand so that the reserves will be produced in the future and the damage that could incur from drilling a well on top of the structure in this field *could possibly ruin more reservoirs and lose more gas than could be gained by the particular well.* (Emphasis Added)

Then with respect to drilling in general in this field, Mr. SINGER expressed himself as follows:

Mr. WUNDER. You also testified that there would be greater damage to the field by new drilling.

Mr. SINGER. Yes, due to the pressure situation in the field.

Mr. WUNDER. In spite of the fact that physically you could drill new wells it would cause damage by so doing.

Mr. SINGER. That is my opinion, yes sir.

The four cases thus cited in the Subcommittee report's discussion of enforcement of delivery obligations do very little to make a case that producers are in breach of their gas sales contracts. These cases also fail to indicate in any way that producers are required by their contracts to deliver firm daily quantities of gas. Moreover, these case studies do not demonstrate in any way that producers are withholding gas in anticipation of deregulation.

LACK OF RELIABLE INFORMATION FOR REGULATION

The Subcommittee Majority uses the forum of this report to continue their attack on AGA reserve estimates, but they do a rather strange thing. They cite in the report the conclusion of the updated 31 lease investigation performed by the FPC staff. This FPC staff report states: "We would conclude that the estimates (AGA) in total are reasonable," not unreasonable, but reasonable.

We find the citing of this updated FPC report interesting for two reasons. The first is, of course, that it detracts mightily from the Subcommittee report's position that these reserve estimates are unreasonable. The second is that the original 31 lease study, ever since it was released in 1974, has provided ammunition for those challenging the validity of AGA reserve estimates. Now, the update concludes the estimates are reasonable. Can anyone ask for anything more than reasonableness in reserve estimating. This is an art, not a science. One can never come up with a perfect reserve number for a gas field or reservoir until that field or reservoir has been totally depleted. Petroleum geologists and engineers experienced in reserve estimating often arrive at different reserve numbers even when looking at the same data at the same time. There is no such thing as a perfect reserve number, as we said earlier, until the field or reservoir has been totally depleted. What you strive for is a reasonably accurate number, and the FPC staff report, cited by the Subcommittee's report as proof of inadequacy, states the reserve estimates are reasonable. Dr. Vincent McKelvey, Director of the United States Geological Service (USGS) pointed out in his testimony before the Subcommittee on January 21, 1975, how difficult it is to make reserve estimates when he said the following:

Mr. McKELVEY. *Keep in mind that you are attempting to estimate here something that cannot be seen and counted in the way inventories of many other*

commodities are made. It is an estimate that is based on known information at a few points and projected, then, having to be projected in between those points or, in this case, drill holes. So estimates of this kind, even when a good deal of information is available, are necessarily subject to revision over time as more production experience is required. (Emphasis Added)

The Majority cite two other studies in their effort to demonstrate that AGA reserve estimates are unreliable. The first is one done by the FTC's Bureau of Competition (BOC) which concluded that the AGA estimates were inaccurate. Another curious thing happens with respect to the Subcommittee report's discussion of this study. There is absolutely no mention of a study performed by the FTC's Bureau of Economics (BOE) which was assigned the task of studying the BOC Statistical Presentation. BOE performed this analysis and found no evidence of underreporting. We believe that this analysis by BOE was so convincing that the FTC realized that it quite simply did not have enough evidence to issue a complaint, contrary to the "abundance of evidence" argument made in the Subcommittee report. It is clear to us that there was no abundant evidence supporting the issuance of an FTC complaint. On the contrary what the Commission was faced with was years of investigation into this issue and no conclusive evidence to support the complaint. Thus, no complaint was issued. These facts speak for themselves.

The third study which is cited by the Subcommittee report is the handiwork of the Subcommittee's staff. On January 21, 1975, the staff testified that they had compared AGA reserve estimates with USGS for 153 pure gas fields in the Federal Domain and found the USGS figures appreciably higher. Our first point is that we do not know if the fields used in this comparison were pure gas fields, or whether or not fields were compared to leases. No one, other than the staff and the Chairman, to our knowledge has ever seen this study. It has, thus, never been subjected to intense scrutiny because intense scrutiny was impossible. The sum and substance of this report was that the staff compared some AGA reserve estimates and the USGS reserve estimates were higher.

We do not challenge for a moment the integrity of the staff that performed the analysis, nor the Chairman, but they could have made mistakes. We do not believe that they have ever claimed to be infallible. The whole point is that we really do not know enough about this staff study to place very much importance upon it. All of the other reserve reports have been subjected to close scrutiny. This staff study has escaped any serious review. Dr. McKelvey of the USGS and Chairman Moss made this point best in the following exchange:

Mr. SANTINI. My principal concern is in the exercise of these estimate judgments. Was there an intentional miscalculation or undercalculation on the part of AGA in the estimation of these fields? What is your judgment?

Mr. McKELVEY. I really could not speak to that, Mr. Santini. I can't speak to it with any knowledge whatsoever.

Mr. MOSS. Would the gentleman yield?

Mr. SANTINI. Yes.

Mr. MOSS. The Chair would suggest this witness did not address himself to this for the simple reason he did not have available nor has he made mention of having available the data which was utilized by Dr. Galloway in his comparative study and therefore he would not be able to respond to the gentleman's question. (Emphasis Added)

Although we do not know very much about the comparisons made by the Subcommittee staff, we did learn something about how the

USGS makes reserve estimates, and by subjecting their methodology to scrutiny, it becomes easily apparent why the USGS would and should come up with a higher reserve estimate than the AGA.

The first methodological point that we can make is that the USGS definition of measured reserves and the AGA definition of proved reserves are not the same. The AGA definition of proved reserves states that reservoirs are to be considered proved that have demonstrated the ability to produce by either actual production or conclusive formation test. The USGS definition does not make this requirement. The USGS definition is, therefore, more liberal than the AGA, because it utilized more speculative data in making these reserve estimates as the following exchange illustrates:

Mr. WUNDER. The data you used in making your reserve estimates, what was that—electric logs and core analysis?

Mr. BRYAN. All of that plus much additional data.

Mr. WUNDER. Production history?

Mr. BRYAN. Yes, sir, where it is under production.

Mr. WUNDER. Electric logs and core analyses, isn't that more speculative than actual production history and flow test?

Mr. BRYAN. Yes, sir. That is what is involved in the volumetric estimates, the logs, et cetera. As soon as production is established certainly with pressure information, then we are allowed or have the data to make a decline estimate and sometimes material balance if the reservoir has produced long enough to justify this type of study.

Mr. WUNDER. *So in effect you did use more speculative data in making those estimates?* (Emphasis Added)

Mr. BRYAN. Yes, sir. (Emphasis Added)

Mr. MOSS. We look again for qualification. More speculative than what?

Mr. WUNDER. The production history, the flow test which is what the requirement for the AGA specifies.

Dr. McKelvey testified that USGS's definition of measured reserves was essentially synonymous with the AGA's definition of proved reserves. When this point was pursued, as the above exchange depicts, the USGS in making its reserve estimates did not rely exclusively on production history and flow tests as the AGA did, but in fact used more speculative data such as electric logs and core analyses.

The AGA, as we understand it, has recently changed its definition for Southern Louisiana to include the utilization of this more speculative data, but during the comparative years analyzed by the Subcommittee Staff, the AGA definition requiring production history on flow was exclusively utilized.

Dr. McKelvey even conceded under questioning that USGS's definition was more liberal in some instances in the following exchange.

Mr. WUNDER. Thank you, Mr. Chairman. Mr. McKelvey, would you not admit that your definition of measured reserves is *more liberal than the AGA definition of proved reserve?*

Mr. McKELVEY. *In some instances it would be*, as I have indicated. Generally, however, they would be synonymous and we have often used estimates of proved reserve, taken them literally and put them in that category. (Emphasis added)

Dr. McKelvey thus admitted that USGS had a more liberal definition in some instances. He nor did any of his staff point out any area where the USGS definition was more conservative, and we have identified some of the aspects of the USGS definition which make it more liberal in some instances and not more conservative in any instance. It is therefore more liberal.

Another difference in the AGA versus USGS reporting systems is that AGA estimates do not take into consideration the additional gas

that will be recovered by installation of compression facilities until those facilities are actually installed. The USGS reporting system, however, includes additional gas which may result from compression if the estimator predicts compression may be installed at a future date as the following exchange illustrates.

Mr. WUNDER. Mr. McKelvey, in arriving at the reserve estimates that you made, did you assume the presence of the compression in each and every reservoir in making that determination?

Mr. McKELVEY. I ask Mr. Bryan to answer that.

Mr. BRYAN. No, sir, only where the economics would appear to justify that.

Mr. WUNDER. Does the AGA take into account the presence of compression?

Mr. BRYAN. I assume they don't.

Mr. WUNDER. That could make a significant difference in your figures, could it not, the presence of a compression?

Mr. HORTON. The AGA does where it is already installed.

A fourth study that has been going on for quite some time into the question of reliability of AGA reserve estimates is not mentioned in this report. We find that to be strange, because this fourth study is the Subcommittee's own investigation. The Subcommittee in June, 1975 subpoenaed from producers and the AGA over 750,000 documents relating to reserve estimates. All of the producers and the AGA complied with the subpoena.

The Subcommittee staff with the assistance of General Accounting Office personnel have been going over these reserve estimates for over a year, but to date we have seen no report on this subpoenaed material. We have no idea what these figures would show.

The Subcommittee over a year ago thus obtained the data that both the FTC and the FPC were unable to acquire. We were assured on April 14, 1976 by Mr. Ottinger, who was chairing an Oversight hearing of the FTC, that we would be seeing some results from this material shortly:

Mr. COLLINS. Their books were a responsibility for a tax basis and a responsibility to the stockholders. I want to tell you one interesting thing. We are asking you for those figures and yet we have them down in the warehouse. *We have had them since July of last year. We have been sitting with all these figures. We have a great big staff here, yet we ask you what conclusions come out of them. Since July, for nearly 1 year, we have had a warehouse full of all this junk and haven't come to any conclusions ourselves.*

* * * * *

Mr. OTTINGER. Just for the record, I would like to say I am informed that we will be publishing and releasing shortly the documents which have been obtained by the committee. Those will be available, but we wanted to have a chance to look at them.

[The following letter was received for the record:]

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., May 11, 1976.

Hon. JOHN E. MOSS,

Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I am returning herewith a corrected copy of the transcript of the Subcommittee hearing on the Federal Trade Commission held on April 14, 1976. At page 2-56, the following comment appears by me:

"Mr. Ottinger. Just for the record, I would like to say I am informed that we will be publishing and releasing shortly the documents which have been obtained by the committee. Those will be available, but we wanted to have a chance to take a look at them."

The comment was made on the basis of a misunderstanding based on staff information furnished to me. My statement should be corrected to read as follows:

"Mr. Ottinger. Just for the record, I would like to say I am informed that we will be publishing and releasing shortly *a report based on the documents which have been obtained by the committee.*" (Correction in italic.)

Clearly, any decision on release of the documents or their contents would not be affected by this comment and would be a matter for the Subcommittee to decide under the Rules of the House of Representatives.

I would appreciate having a copy of this letter included in the transcript of the hearing.

Sincerely,

RICHARD L. OTTINGER,

Member, Oversight and Investigations Subcommittee.

Mr. Ottinger corrected himself for the record as the above letter indicates, but his letter indicates that "a report based on the documents" will be released shortly. Mr. Ottinger's letter was dated May 11, 1976. We have yet to see the report.

LACK OF CONSUMER INTEREST REPRESENTATION

The reader of the Subcommittee report and its recommendations concerning consumer representation would gain the initial impression that there is not very much consumer input into the Commission. To confirm this fact, we checked to determine, for instance, if in the FPC proceedings with respect to Order No. 770 there was any consumer representation. We found that it was massive as the following list indicates:

PARTIES REPRESENTING CONSUMER INTERESTS IN THE BIENNIAL REVIEW OF THE NATIONAL RATE FOR NEW GAS, DOCKET NO. RM75-14, OPINION NO. 770

American Public Gas Association
 Consumer Federation of America
 New Jersey Board of Utility Commissioners
 State of Minnesota
 Minnesota Public Service Commission
 Senator Hubert H. Humphrey
 Public Service Commission of Wisconsin
 United Steel Workers of America
 United Automobile, Aerospace, and Agricultural Implement
 Workers of America
 International Association of Machinists and Aerospace Workers
 National Rural Electric Cooperative Association
 American Public Power Association
 United States Conference of Mayors
 United States Farmers Union
 National Farmers Organization
 Energy Action Committee Toward Utility Rate Normalization
 Industrial Department AFL-CIO
 Montana Consumer Council
 Commonwealth of Pennsylvania
 Public Service Commission of New York
 State of New Mexico
 State of Utah
 Congressman Lujon, New Mexico

Senator James Abourezk (S.D.)
 Senator John Durkin (N.H.)
 Senator William Proxmire (Wis.)
 Congressman Berkley Bedell (Iowa)
 Congressman William Brodhead (Mich.)
 Congressman Michael Harrington (Mass.)
 Congressman Herbert Harris (Va.)
 Congressman William Hughes (N.J.)
 Congressman Andrew Maguire (N.J.)
 Congressman Toby Moffett (Conn.)
 Congressman John Moss (Cal.)
 Congressman James Obesston (Minn.)
 Congressman Richard Ottinger (N.Y.)
 Congressman John Sieberling (Ohio)
 Congressman Gerry Studds (Mass.)
 Congressman Les Aspin (Colo.)
 Pennsylvania Public Utility Commission
 Georgia Public Service Commission
 South Dakota Public Utilities Commission

DISTRIBUTION COMPANIES

American Natural Gas System
 Central Illinois Public Service Co.
 Citizens Gas & Coke Utility
 Columbia Gas System
 Consolidated Natural Gas System
 Consumers Power Company
 Dayton Power and Light Company
 Equitable Gas Company
 Illinois Power Company
 Indiana Gas Company
 Michigan Gas Utilities Company
 National Fuel Gas System
 Niagara Mohawk Power Corporation
 Northern Illinois Gas Company
 Orange & Rockland Utilities, Inc.
 The Peoples Gas System
 South Carolina Electric & Gas Company
 Atlanta Gas Light Company
 Mountain Fuel Supply Company

Given this degree of consumer representation already, we do not know if the Subcommittee recommendations on this point are salient.

ABANDONMENT OF COST BASED PRICING

The Subcommittee report condemns the Commission for what they consider to be an abandonment of cost based pricing in Opinion No. 770. On the very first page of the Opinion the Commission's majority stipulate that: "This rate is fully cost based and justified." The Opinion proceeds on for 108 pages plus substantial appendices primarily discussing in minute detail the various individual cost components and numerous cost studies of record. This array of cost studies includes

studies by the FPC's Bureau of Natural Gas and its Office of Economics, various cost studies by the United Distribution Companies and by producers. The \$1.42 rate itself is the result of a cost study and this rate is fully supported by the other cost studies.

That the rate is cost based is further shown by the fact that the independent producers on rehearing of Opinion No. 770 claim that the Commission committed an error in failing to consider non-cost evidence of record showing that natural gas at \$1.42 is still the cheapest source of energy in this country.

The report indicates the Commission in setting this rate failed to use "actual costs", but instead used "hypothetical costs." The demand of the report is impossible. What is being set by the Commission is a rate for the present and future. It would be applied to future new sales of undeveloped and unexplored reserves where costs have not even been incurred as well as new sales where development drilling has not been completed. Drilling cost data and reserves data for 1976 are obviously not available and will not be until well into 1977. The cost based rate must use available cost data and adjust for trends indicated by the data.

The report next indicates that "no less than 43 cents of the \$1.42 price is intended to reimburse natural gas producers for Federal income tax payments incurred as a result of the repeal of the oil and gas depletion allowance." This statement is incorrect in several respects. First of all, the 43 cent allowance tax is not based upon the \$1.42 price, but the level price of \$1.61, which is the constant price that would result if there were no escalation factor included in the price determination. This fact is made abundantly clear by Exhibit 30 of Order 770 which we will reprint for the edification of the Majority.

EXHIBIT 30
699-H RECONCILIATION

	Original 699-H	699-H with 1975 cost data	699-H with 1975 cost and 1976 tax treatment
Basic data:			
Productivity (Mcf per foot).....	485	300	300
Drilling costs per foot.....	29.83	38.53	38.53
Dry hole factor.....	1	.80	.80
Productive life (years).....	18	15	15
Cost components (cents per Mcf):			
Other exploratory.....	2.80	4.73	4.73
Exploratory O/H.....	.83	1.71	1.71
Lease acquisition.....	4.28	14.13	14.13
Dry hole.....	3.72	8.12	8.12
Successful well.....	6.15	12.84	12.84
Recompletion.....	.20	.50	.50
Other production facilities.....	1.39	3.44	3.44
Total.....	19.36	45.47	45.47
Cost allocation factor (percent).....	(1)	91	91
Allocated cost (cents per Mcf).....		41.38	41.38
Working capital (cents per Mcf).....	.46	1.33	1.33
Level price (cents per Mcf).....	53.47	109.10	161.16
Royalty.....	8.55	17.46	25.79
Total operating expense.....	3.30	2.91	2.91
Liquid credit.....	(3.89)	0	0
Taxes (net).....	0	0	43.72
Return of investment.....	19.36	41.38	41.38

† Not available.

This statement in the report is further in error in that it indicates that the Federal income allowance was granted solely because of the repeal of the depletion allowance. This is categorically untrue. Any taxable income over \$25,000 is taxable at a rate of 48%. The repeal of the depletion allowance forced the Commission to reconsider the entire tax liability question, because this repeal had the effect of significantly increasing the tax liability of the producers. The tax liability component was put in, because taxes have now become an even more significant aspect of the cost of doing business for a natural gas producer. The fact is that Congress, itself, sought to and did impose additional income tax on the industry as a result of the Tax Reduction Act of 1975. We also note that the report on which the Subcommittee report relies, which indicates that producers pay what they call an "effective tax rate" of 5.36%, is based upon a period prior to the elimination of the oil and gas depletion allowance. We will explain later how the report arrives at this so-called "effective tax rate."

The report also makes the statement that Order No. 770 "failed to take tax benefits into account. . . ." This statement is also categorically untrue. We call the Majority's attention to page 89 of the Opinion which states: "A 48% tax rate is used to compute tax savings." A clearer statement, we believe, could not have been made. The Commission thus very clearly took tax benefits into account at a full 48% rate just as they did in Opinion 699-H.

The report then goes on to cite the case of *FPC v. United Gas Pipeline Co.* and quotes language from that decision as follows: "The Commission has the power to reduce the cost of service and hence rates, based on the application of nonjurisdictional losses to jurisdictional income." This case is irrelevant to the present discussion. The Majority is trying to force this decision to say that the Commission should have taken into account such things as the foreign tax credit. What this case is saying is that United's customers should not be required to pay for losses that United suffered in nonjurisdictional activity, and further that United customers must only pay for United's jurisdictional activities, not its nonjurisdictional activities. This case, thus, bolsters the FPC position that nonjurisdictional activity should not be included. Jurisdictional losses should be included, nonjurisdictional should not, just as jurisdictional benefits should be included and nonjurisdictional should not. This case, thus, stands for the proposition that customers of a natural gas company should not be required to subsidize nonjurisdictional activities of a regulated company. The converse would also be true.

The report is also critical of Order No. 770, because it abandoned the traditional "show me" policy. What the report is suggesting is that the Commission should have required producers to enter into the record of the proceedings their tax returns for past years. We do not know of anything useful that would have been shown to the Commission if they had these tax returns. First of all, these tax returns do not isolate jurisdictional gas sales nor do they break out tax on sales by various vintages of gas, none of which was sold at \$1.42. Thus, for setting the rate for new gas, taxes as reflected in producers' income tax returns are

not relevant for ascertaining future tax liabilities. How, we ask, would taxes paid on old gas be relevant to future tax liability on new gas at a different rate? Furthermore, historical returns reflect depletion allowances, the effects of consolidated returns and intangible drilling costs. The first of these has been repealed. The second of these is not applicable under the Commission's policy to restrict costs for revenue considerations to jurisdictional activities, and the third is already factored into the rate determinations (both 699-II and 770) of tax savings on initial outlays.

In an attempt to uncomplicate what the Commission did, we will try to explain it in simple terms. In setting this new gas rate, the Commission acquired data on the extent of the producers' investment by taking into account such things as successful well costs, dry hole costs, recompletion costs, lease acquisition cost, etc. Second, once having established that investment figure, it reduced the figure by taking into account tax savings or deductions at a 48 percent rate. Third, with investment minus tax savings computations in hand, it computed what it would cost per mcf of natural gas to recover that investment. Fourth, once it determined what it would take to recover that investment, it allowed for a rate of return on that investment. Fifth, with these figures in hand, it could compute a tax liability figure on the rate of return, because it could compute this tax liability at the 48 percent rate due to the fact all income over \$25,000 is taxed at a 48 percent rate under Federal tax laws for corporations.

In reviewing the material presented to the Commission in its rehearing proceeding with respect to Order No. 770, we came upon a highly interesting exhibit that was entered into the record which illustrates that if no consideration were given to taxes at all, this would mean neither tax savings nor tax liability. The constant price would still be \$1.44. We offer this table on the following page as our Table II.

The report then states that the Commission assumed that producers would be paying the full 48 percent statutory corporate income tax rate, after accounting for selected deductions and credits. The report then concludes that the 48 percent tax rate should not have been used because the oil and gas producers pay according to the report only 5 percent in taxes. The report is confusing two concepts, thus, exhibiting a fundamental misunderstanding of the Internal Revenue Code and Opinion No. 770.

First, the statutory rate for corporation income taxes is 48 percent as the following tax rate tables indicate:

Tax-Rate Tables—Corporation Income Taxes

Taxable years ending in 1975 and in 1976:

Surtax exemption.....	\$50,000
Normal tax:	
On taxable income through \$25,000 (percent).....	20
On taxable income above \$25,000 (percent).....	22
Surtax (present).....	26
Taxable years ending before or after 1976:	
Normal tax (percent).....	22
Surtax (percent).....	26

TABLE II.—TRUE COST WHEN NO FEDERAL INCOME TAX IS ALLOWED

Item	Exhibit 30 of opinion No. 770 adjusted to show the cost of gas assuming no Federal income tax		
	699-H (using tax deductions but assuming no tax)	Last column of exhibit 30 showing cost with tax allowance	True cost without taxes
(1)	(2)	(3)	(4)
Cost components (cents per Mcf):			
Other exploratory	4.73	4.73	4.73
Exploratory overhead	1.71	1.71	1.71
Lease acquisition	14.13	14.13	14.13
Dry hole	8.12	8.12	8.12
Successful well	12.84	12.84	12.84
Recompletion50	.50	.50
Other production facilities	3.44	3.44	3.44
Total	45.47	45.47	45.47
Cost allocation factor (percent)	91	91	91
Allocated cost (cents per Mcf)	41.38	41.38	41.38
Working capital (cents per Mcf)	1.33	1.33	1.33
Level price (cents per Mcf)	109.10	161.16	144.49
Royalty	17.46	25.79	23.12
Total operating expense	2.91	2.91	2.91
Liquid credit	0	0	0
Taxes (net)	0	43.72	0
Return on investment	41.38	41.38	41.38
Return on investment (including working capital)	47.35	47.36	77.08
Effect of 699-H error of taking full advantage of all tax deductions but assuming no tax liability (cents)			35.39

As the tax table indicates, a corporation pays a normal tax rate of 22 percent and surtax rate of 26 percent which equals 48 percent. We will illustrate this point by using a simplified example:

ABC Oil Company

Gross income	\$1,000,000
Deductions	870,000
Taxable income	130,000
\$25,000 (taxable income) times .20 (tax rate on first \$25,000)	5,000
\$105,000 (taxable income) times .48 (tax rate)	50,400
5.54 percent of Gross Income	55,400

As the above example illustrates, whatever the taxable income of a corporation is, putting this matter in the most simple terms, it will pay taxes on that income at a 48% rate on any taxable income over \$25,000. ABC oil company in our example, thus, paid 5.5% in taxes as measured against its gross income. This 5.5% equates to the 5.3% mentioned in the Subcommittee report. The 5.5% figure is not a tax rate, because the tax rate is statutorily mandated at 48%. The Commission used the appropriate "tax rate" in its model. The report is discussing "tax liability" which is a different concept altogether. Additionally, the tax liability figures mentioned in the report are for a period of time prior to the repeal of the depletion allowance.

The Commission is rebuked in the report for failing to take into account a mechanism used to reduce producers' U.S. income tax liability which is the foreign tax credit. We do not believe that it could have done otherwise, and this again requires some understanding of the Internal Revenue Code. The relevant Section of the Code is 904.

First of all, the foreign tax credit is a means of avoiding double taxation. It cannot be used as a means of off-setting income tax lia-

bility from income generated in the United States. We remind the Majority that what the FPC is doing is setting rates for natural gas produced in such places as Texas, Oklahoma, and Louisiana, not Saudi Arabia. A producer, thus, cannot use a foreign tax credit to offset any income that is derived from the sale of this natural gas. Foreign tax credits apply only to foreign income.

The foreign tax credit is simply this: if ABC Oil Company, a U.S. Corporation, has operations in both the United States and a foreign country, it will derive income from both sources. With respect to the income generated in a foreign country, ABC Oil Company is subject to the tax laws in that country, and will pay a tax in that country on the taxable income attributable to that country. With respect to the United States, ABC Oil Company is subject to income tax liability on its income from domestic and foreign operations. Section 904 of the internal revenue code allow ABC Oil Company to take a credit against income generated in the foreign country for the taxes paid to the foreign country. It cannot be used to offset domestically generated income.

The report also attacks the credibility of JAS drilling. It indicates that the JAS figures were not verified by the FPC. Another branch of the Government, namely, the Bureau of the Census produced its own figures or drilling costs for two years and in both cases the census figures were higher than the JAS figures, as our Table III which follows will illustrate.

TABLE III.—CONFIRMATION OF JAS DRILLING COSTS BY BUREAU OF THE CENSUS

(Per foot)

Report year:	Average drilling costs per foot—total United States			
	Gas wells		Dry holes	
	JAS ¹	Census ²	JAS	Census
	(1)	(2)	(3)	(4)
1967.....	\$23.05	\$24.37	\$12.87	\$14.93
1968.....	24.05		12.88	
1969.....	25.58		13.23	
1970.....	26.75		15.21	
1971.....	27.70		16.02	
1972.....	27.78	28.87	17.28	20.38
1973.....	27.45		19.22	
1974.....	34.11		26.76	

¹ Joint association survey.

² Census of Mineral Industries—SIC Industry Group 131, Bureau of the Census, Department of Commerce—tables 6B and 6D for respective years.

The report is further critical of JAS figures because they are industry generated. Who else but industry can tell you what it costs to drill a well? We are not aware of anyone else but industry who is drilling wells to produce oil or natural gas. These figures will always be industry generated and we already pointed out that the Bureau of the Census computed drilling costs based, of course, on industry supplied data and the census came up higher than JAS.

CONCLUSION

In conclusion, we would like to state that in this report we also have not been uncritical of the Commission. Our criticism has been

directed exclusively to past activities of the FPC, such as the Mobil Grand Isle 95 case. We think, however, that the Commission is finally moving at least in the right direction. It is attempting to do something about the deplorable natural gas shortage.

We believe that Opinion No. 770 was an indispensable step to elicit additional supplies of natural gas in that Congress has failed to act decisively on measures that would deregulate the well-head price of new natural gas. We believe that deregulation is still the ultimate answer, but something has to be done in the interim to assure adequate gas supplies. The Commission action on Opinion No. 770 is very definitely a step in the right direction.

APPENDIX I

GAS PURCHASE AND SALES AGREEMENT

THIS AGREEMENT made and entered into this _____ day of _____, by and between _____ a _____ corporation, herein called "Buyer," and _____ a _____ corporation, herein called "Seller."

WITNESSETH THAT:

WHEREAS, Buyer owns and operates a natural gas transmission pipeline system, portions of which are located in _____ thereof; and
WHEREAS, Seller owns certain rights, title and interest to gas reserves located in _____

NOW, THEREFORE, Buyer and Seller, in consideration of the mutual agreements herein contained, do hereby covenant and agree as follows:

1. *Definitions:* For the purposes of this Agreement, the following definitions shall be applicable:

(a) The term "gas" shall include casinghead gas produced with crude oil, natural gas from gas wells, and residue gas resulting from processing either casinghead gas or gas well gas or both.

(b) The term "casinghead gas" as used herein excludes gas cap gas and shall mean gas produced with crude petroleum from an oil well, all or substantially all of which is indigenous to the oil strata from which such crude petroleum oil is produced, together with gas lift gas produced with oil, whether originally produced from the same oil stratum or not.

(c) The term "gas well gas" shall mean all other gas, including gas cap gas, or the mixture of hydrocarbon gases produced from Seller's lease other than that includable with the definition of casinghead gas.

(d) The term "liquids" shall mean condensate and/or distillate which may be recovered by Seller by either mechanical or low temperature means from the gas hereunder.

(e) The term "lease" shall mean the oil, gas and mineral lease described in Exhibit "B" attached hereto, and the lands covered thereby, in which Seller holds gas rights which are committed to this Agreement as provided in Section 4 hereof.

(f) The term "committed reserves" shall mean the gas reserves as limited by reservoirs or depths as described in Exhibit "B," located in and under the lease, which are attributable to the interest of Seller therein.

(g) The phrase "recoverable gas originally in place" shall mean the gas in the committed reserves as of the date of initial delivery of gas hereunder which is recoverable from the lease, based upon knowledge concerning all committed reservoirs penetrated by wells and condi-

tions existing at the time of the particular determination or redetermination.

(h) The term "Seller's delivery capacity," as used herein, shall mean Seller's pro rata part of the maximum amount of gas well gas which can be withdrawn in any one day from the lease, under applicable rules and regulations and in accordance with prudent operating practices, and which is available for delivery at the delivery points provided for in this Agreement at the pressure required by Section 8 hereof.

(i) A day shall begin at 8 o'clock a.m. on each calendar day and end at 8 o'clock a.m. on the following calendar day; and a month or year shall begin at 8 o'clock a.m. on the first calendar day of such period of time and end at 8 o'clock a.m. on the first calendar day following such period.

(j) The term "contract year" shall mean each successive period of twelve (12) months beginning on the first day of the next month following the month in which initial deliveries of gas are commenced and each anniversary of such date; provided, however, the period beginning with the date of initial delivery to the first day of the following month shall be treated as part of the first year.

(k) The term "Mcf" shall mean one thousand (1,000) cubic feet.

(l) The term "contract quantity" shall mean the applicable quantity specified in Section 3 hereof averaged over each contract year.

2. Certificates of Public Convenience and Necessity and Construction of Facilities:

(a) Upon execution of this Agreement, each of the parties hereto shall file with the Federal Power Commission, and other regulatory bodies having jurisdiction, any required applications for certificates of public convenience and necessity. Such application, if any, will be prosecuted diligently. In the event any of such applications are denied, or if satisfactory certificates have not been issued and accepted by the applying party within one hundred eighty (180) days after the filing of such application for a certificate of public convenience and necessity, either party hereto may, by written notice mailed to the other party hereto, terminate this Agreement in its entirety, and if either party so terminates this Agreement, then the respective obligations of the parties to sell and buy gas hereunder shall be of no force and effect from the date of such termination.

(b) If such certificates are issued and neither party hereto has cancelled this Agreement as provided in Subsection (a) of this Section 2, Buyer will use due diligence to install, or cause to be installed, and place in operation the facilities necessary to receive deliveries of gas hereunder, and Seller will use due diligence to install and place in operation, or cause to be installed and placed in operation, the facilities necessary for delivery of gas hereunder at the delivery point or point hereinafter provided.

3. Quantity: During each year Seller agrees to sell and deliver to Buyer, and Buyer agrees to purchase and receive all of Seller's share of the following quantities of gas produced from the lease: provided, however, that in the event said quantities which are available are not taken, Buyer agrees to pay for said quantities not taken.

(a) Commencing on the date of first delivery hereunder and continuing for a period of five (5) years thereafter, a quantity of gas equal to ninety percent (90%) of Seller's delivery capacity, such de-

livery capacity to be determined by Seller in the conduct of periodic tests as hereinafter set forth.

(b) Commencing five (5) years from the date of first delivery and continuing throughout the term of this Agreement, a quantity of gas equal to eighty-five percent (85%) of Seller's delivery capacity, such delivery capacity to be determined by Seller in the conduct of periodic tests as hereinafter set forth.

(c) Buyer shall have the right to purchase, and Seller will sell and deliver to Buyer, such additional quantity of gas per day as Buyer may from day to day elect to purchase up to a total quantity equal to the smallest of the following quantities:

(i) Seller's pro rata part of the total quantity which the wells are capable of producing when produced at their maximum efficient rates of flow; or

(ii) Seller's pro rata part of the total quantity which the wells are capable of producing when produced at their respective allowable rates of flow under applicable orders, rules, regulations or laws; or

(iii) Seller's pro rata part of the total quantity equal to all casinghead gas and a quantity of gas well gas equal to Seller's delivery capacity.

(d) The gas purchased hereunder shall be delivered and received as nearly as practicable at uniform hourly and daily rates of flow. The daily quantity of gas actually delivered and taken may vary ten percent (10%) above or below the quantity requested by Buyer to be delivered hereunder, but in no event, however, shall the total quantity delivered and taken during any month vary more than five (5%) above or below the total quantity requested by Buyer to be delivered hereunder for such month.

(e) Seller will advise Buyer when Seller proposes to commence initial delivery of gas well gas hereunder, at which time the parties shall promptly set a date for determining the initial amount of Seller's delivery capacity, which capacity will be effective as of the first day gas well gas is delivered hereunder until the effective date of the next succeeding test taken as hereinafter provided. Such test shall be over a period of not less than fifteen (15) days nor more than thirty (30) days, and during such test Buyer will fully cooperate with Seller to the end of establishing Seller's delivery capacity.

(f) Subsequent to establishing Seller's initial delivery capacity, tests of similar duration for Seller's delivery capacity shall be conducted at the request of either Buyer or Seller, but not more often than once each three (3) months. The results of any such test shall be effective as of the day such test is concluded.

(g) Seller's delivery capacity on each day of the period between the effective date of any two (2) consecutive tests thereof shall be considered to be the same as Seller's delivery capacity determined by the first of such two (2) tests. If on any one day Seller fails to deliver for any reason except force majeure the quantity of gas well gas requested by Buyer (normal dispatching variations, not to exceed five percent [5%], excepted), then the quantity of gas well gas actually delivered on such day shall be deemed to be Seller's delivery capacity for the duration of such failure. Buyer agrees to notify Seller of the failure of Seller to deliver the quantities so requested as soon as

practical after Buyer learns of such failure in the course of Buyer's normal and customary operating procedures.

(h) If the quantity of gas taken by Buyer hereunder during any contract year after the date of initial delivery of gas hereunder has not permitted Seller to maintain ratable withdrawals from any reservoir subject hereto (under then existing applicable rules, regulations, orders or laws) with other operators withdrawing gas from the same reservoir, Buyer will purchase and receive or will pay for at the then effective price, if available and not taken during the succeeding contract year, that additional quantity of gas over and above the contract quantity for such period which will permit Seller to make up the deficiency in ratable withdrawals accrued during the contract year mentioned above.

4. *Commitment of Reserves:*

(a) Seller commits to the performance of this Agreement all gas produced from and attributable to the interest of Seller in the lease and lands described in Exhibit "(B)" hereto annexed and made a part hereof as limited by reservoirs or depths as such Exhibit "3" may be amended from time to time.

(b) Seller agrees not to sell to any other party or parties, except contractors conducting drilling or reworking operations for Seller, any gas produced from the committed reserves during the term hereof without the written consent of Buyer.

(c) If Seller assigns or subleases the lease or any portion thereof committed hereto or assigns gas rights thereunder to any assignee or lessee, said assignment or sublease shall not be binding upon Buyer until Buyer is furnished with copies of the recorded instruments by which such assignments are accomplished.

(d) Seller agrees to furnish Buyer the basic information and data pertinent to the estimation of reserves as such information and data becomes available (provided same has not been classified by Seller as confidential information), including, but not limited to, the furnishing of surface maps, well logs, electric logs, core analysis data, flow and pressure tests, casing programs and gas analyses.

5. *Reservations of Seller:* Seller reserves the following prior rights with sufficient gas to satisfy such rights:

(a) To operate its property free from any control by Buyer in such a manner as Seller, in its sole discretion, may deem advisable, including without limitation, the right to drill new wells, to repair and rework old wells, and to abandon any well or surrender any lease or portion thereof; provided, however, in the event Seller should terminate or surrender any lease described in Exhibit "B" hereto, written notice of same shall be given to Buyer within thirty (30) days. Notwithstanding the foregoing provisions, Seller shall, however, not be liable for any failure by reason of inadvertence to give notice to Buyer of its intention to surrender or permit to lapse any such leasehold or other interest.

(b) To separate the gas in mechanical, low temperature or other separation equipment selected by Seller.

(c) To process the gas, or have same processed, for the recovery of liquefiable hydrocarbons including the methane-ethane stream; provided, however, that such processing will not, including shrinkage and fuel, remove more than ten percent (10%) of the volume of gas produced for delivery by Seller and purchased by Buyer daily here-

under at the _____ point and provided, further, that such processing will not render the gas incapable of meeting the quality specifications contained herein. Seller may so process the gas or have same so processed before delivery to Buyer, or after delivery to Buyer, at the _____ presently situated on Buyer's _____ or at such other processing plant that may be constructed in the future on Buyer's _____ in the event Seller's gas is diverted so as to flow in a _____ direction in Buyer's _____.

If the gas delivered hereunder is processed by Seller or for Seller's account after delivery to Buyer, Seller hereby agrees to pay to Buyer a transportation rate for the transportation of fuel and shrinkage gas attributable to Sellers. Such rate shall be based on accepted costs for transportation reflecting distance transported and may be changed from time to time; provided, however, in the event the Federal Power Commission or any other governmental body or official having jurisdiction at the time ceases to exercise control over both Buyer and Seller in regard to such matters, commencing with the date of cessation of such control and continuing thereafter for the term of this Agreement, no charge shall be made for the transportation of Seller's fuel and shrinkage gas in Buyer's pipeline.

If Buyer, for any reason, determines that another existing _____ pipeline is necessary or required or a new _____ is built and utilized by Buyer in a way that the gas reserves underlying this Agreement can no longer be processed at the _____ then in such event, Buyer and Seller agree that Seller shall have the right to have the gas processed as herein provided at a mutually agreeable _____ on such pipeline or any mutually agreeable point other than that set forth in this section.

(d) To use gas produced from the lease for developing and operating Seller's lease listed in Exhibit "B," Seller's other properties in the immediate vicinity, Seller's pipelines, compression or other treating facilities, water stations, camps, platform installations, and other miscellaneous uses incident to the operation of such leases or facilities and to fulfill obligations to the Lessor therein.

(e) To unitize its lease with other properties of Seller and of others in the same field, in which event this Agreement will cover Seller's interest in the unit which is attributable to the committed reserves.

(f) To use gas produced from the lease for repressuring, pressure maintenance or cycling operations for the lease shown in Exhibit "B"; provided, however, if as a result of such use Seller is thereby rendered unable to deliver to Buyer the then applicable contract hereunder, the term of the Agreement shall be extended beyond its primary term, until Buyer has thereafter had the opportunity to purchase from Seller at the then applicable contract rate and price, and in accordance with the other terms hereof, a quantity of gas equal to the accumulated deficiencies not delivered by Seller which has occurred by reasons of Seller's election under this Subsection (f).

6. Point of Delivery:

(a) The point of delivery for the gas to be delivered by Seller to Buyer hereunder shall be at the inlet of Buyer's meter to be located on Seller's _____.

(b) Buyer hereby agrees to construct and operate, at its sole expense and liability, a lateral line to the other production platforms con-

structed by Seller in the ———— covered by this Agreement; provided, however, that Buyer will not be obligated to construct and place into operation in excess of one (1) mile of lateral line for (1) each eight billion (8,000,000,000) cubic feet of recoverable gas to be delivered from such platform or for (2) a minimum quantity of eight thousand (8,000) Mcf per day available for delivery from such other platform.

(c) As between the parties hereto, Seller shall be in control and possession of the gas deliverable hereunder and responsible for any damage or injury caused thereby both prior to initial delivery to Buyer and at such times as the gas is in Seller's custody for processing or removal of injected liquids; otherwise, Buyer shall be deemed to be in exclusive control and possession thereof and responsible for any injury or damage caused thereby. Title to the gas sold hereunder shall pass from Seller to Buyer at the point of delivery.

(d) (i) Seller agrees to furnish to Buyer, at the point of delivery, space on Seller's platform or platforms for the installation and operation of Buyer's metering equipment. Both parties recognize that space on a platform is limited and, therefore, shall agree as to the space required for Buyer's metering equipment. All pipelines and equipment placed on the platforms and lease by Buyer shall be and shall remain Buyer's property. Buyer covenants and agrees to fully protect, indemnify and hold Seller, its successors and assigns, harmless from and against each and every claim, demand, or cause of action, and any liability, cost, expense, damage or loss in connection therewith occasioned through Buyer's negligence which may be made or asserted by Seller, Buyer or Buyer's employees, agents, or assigns, or by third parties or agents or employees of Seller, on account of personal injury or death, or on account of property damage, resulting from or arising out of the installation, presence, maintenance and operation of Buyer's pipeline facilities, appurtenances and equipment.

(ii) Buyer shall give Seller notice of the installation of such equipment on said platform or platforms and of any subsequent repair and maintenance thereof, sufficiently in advance so that Seller's representative may be present at such operations.

(iii) Buyer agrees to reimburse Seller for Buyer's use of that portion of Seller's platform occupied by Buyer's metering equipment as follows:

(1) The cost of the platform shall be multiplied by a fraction, the numerator of which is the number of square feet of deck space to be used by Buyer's facilities and the denominator of which is the total number of square feet of ———— on the entire platform. Said amount so obtained shall be paid to Seller within thirty (30) days after gas deliveries commence and said payment shall cover the lease of platform space for so long as this Agreement continues in effect.

(2) In addition to the foregoing single payment, an annual maintenance charge will be paid to Seller by Buyer. Unless a fixed maintenance charge is agreed to by Seller and Buyer hereunder within thirty (30) days after the date of initial delivery, the first such charge will be determined by multiplying Seller's estimated annual operating and maintenance expenses (as agreed to by the parties hereto) of said platform by the fraction set out in the immediate preceding Subsection (1) paragraph. Each

annual charge thereafter shall be based on Seller's actual operating and maintenance expenses for the preceding year and will include a retroactive adjustment for the excess or deficient charges for said preceding year.

(e) In the event during the term hereof Seller has committed gas reserves which Buyer determines to be economically unfeasible to connect to Buyer's pipeline facilities, and if neither Seller nor Buyer elects to install the necessary facilities to allow Seller to produce said gas reserves into Buyer's pipeline facilities, Buyer agrees to release such gas reserves from commitment hereunder within thirty (30) days after written notice by Buyer that such gas reserves are insufficient to warrant facilities to connect such gas reserves to Buyer's pipeline facilities.

7. Delivery Pressure:

(a) Seller shall make deliveries of gas hereunder to Buyer at a pressure sufficient to enter Buyer's facilities, but in no event shall such required pressure exceed one thousand fifty (1,050) pounds per square inch gauge. In the event, however, that the natural flowing pressures of Seller's wells and Seller's facilities enable Seller to deliver gas at pressures greater than one thousand fifty (1,050) pounds per square inch gauge, Seller will do so at Buyer's request. When delivery pressure falls below one thousand fifty (1,050) pounds per square inch gauge, either party may install compression facilities, but neither party shall be obligated to install and operate compression facilities for the delivery of gas hereunder or to continue the operation of such facilities if, in the sole judgment of such party, such operation is or becomes impracticable. If Seller installs compression facilities, then Seller shall install a pulsation dampener, the design of which has been approved by Buyer, between the compression facilities and the delivery point.

(b) Seller shall have agents or employees available at all times to receive from Buyer's dispatchers advices and requests for change in the rates of delivery of gas hereunder as required by Buyer from time to time. Buyer recognizes that Seller's leaseholds are situated in and, therefore, a reasonable period will be allowed for Seller to comply with the dispatching request of Buyer.

(c) If the natural pressure of Seller's wells will not permit delivery of gas to Buyer at a pressure sufficient to enter Buyer's facilities or at one thousand fifty (1,050) pounds per square inch gauge, whichever is lesser, pursuant to Subsection (a) of this Section 7, and neither party elects to compress, or having commenced compression, a party elects to cease such compression, then Buyer shall, if Seller so requests, furnish to Seller in writing, a release of the well(s), reserves and acreage producing such pressure-deficient gas from the terms of this Contract.

8. Prices:

(a) The price to be paid by Buyer to Seller for all delivered or, if available and not taken by Buyer to be paid for hereunder, shall be as follows: From date of initial delivery hereunder to _____ per Mcf Commencing on _____ and for each one (1) year period thereafter for the remaining term of this Agreement, the price shall escalate by two cents (2.0¢) per Mcf.

(b) If the weighted average gross heating value of all gas delivered during any month is less than one thousand (1,000) BTU's per cubic foot, downward adjustment in the price payable shall be made on a proportional basis from the base of one thousand (1,000) BTU's. If the weighted average gross heating value of all gas delivered during any month is more than one thousand (1,000) BTU's per cubic foot, upward adjustment in the price payable shall be made on a proportional basis from a base of one thousand (1,000) BTU's.

(c) If the Federal Power Commission or any successor governmental authority having jurisdiction in the premises should at any time and from time to time hereafter prescribe, for the area in which Seller's properties are situated, a higher rate for the purchase of gas than the price herein provided to be paid, then the price to be paid by Buyer to Seller for gas delivered under the provisions of this Agreement shall be increased, effective as of the date such higher price is prescribed and for the balance of the applicable pricing period, to equal such higher rate. From and after the date upon which any such higher price shall become effective, subsequent escalations, as provided herein, on each escalation date shall be incremental to such higher price as distinguished from the contract prices set forth above.

(d) If at any time and from time to time during the term of this Agreement the Federal Power Commission (or any successor agency having jurisdiction over the rates charged for gas sold hereunder) ceases to have jurisdiction over such matters or ceases to exercise price control over this Agreement or permits price redetermination for the sale of gas hereunder, the price to be charged after the cessation date or the date such price redetermination is permitted shall be redetermined within six (6) months of said date or dates and the redetermined price shall be the average of the three (3) highest prices then being paid for gas of substantially the same quality and quantity under comparable terms and conditions produced and sold within pipeline companies for resale. Furthermore, the price shall be redetermined on the same basis each two (2) years from and after the aforesaid date or dates. However, in no event shall the price to be charged for any period be lower than the higher of the applicable prices determined in Subsections (a), (b), (c) and (e) of this Section 8 or the price in effect prior to the time the price was redetermined under the provisions of this Subsection (d).

(e) Seller shall pay all Federal and State ——— production, gathering, severance or similar taxes now being levied in respect of or applicable to the gas delivered hereunder; provided, however, that if any such taxes in addition to or greater than those being levied on the date of this Agreement, in respect of or applicable to the gas delivered hereunder and for which Seller is liable or which Seller pays for the benefit of owners of gas royalties under the leases covered hereby so long as such additional or greater tax is in effect or paid by Seller on such gas, Buyer will reimburse Seller for eight-eighths (8/8) of the amount by which such additional or greater tax shall exceed the taxes levied on the date of this Agreement. The amount for which reimbursement is due may be billed by Seller monthly, quarterly or at the end of each calendar year.

(f) If, in order to comply with or by reason of any present or future law or rule, regulation or order of the United States Geological Survey, Department of the Interior, or other governmental body

having jurisdiction, the basis or method of measurement of gas delivered hereunder is changed, then the price per Mcf for gas purchased hereunder shall be adjusted to compensate for the change in the basis or method of measurement, to the end that the total amount of money payable for volumes of gas purchased according to the measurement provisions set forth herein shall remain unaffected by such change of a basis or method of measurement.

9. *Term of Agreement*: This Agreement shall be in force from the date of initial delivery under this Agreement for a term of ten (10) years and from year to year thereafter until cancelled by written notice given each party to the other not less than six (6) months prior to the end of such ten (10) year period or any subsequent anniversary date thereof.

10. *Exhibits*: Exhibits "A" and "B" attached hereto and the provisions therein shall constitute parts of this Agreement.

IN WITNESS WHEREOF, this instrument is executed in three (3) counterparts, each of which is an original, as of the date first above mentioned.

APPENDIX II

THIS AGREEMENT, made and entered into as of the _____ day of _____ by and between _____ a corporation of the State of _____ (hereinafter referred to as "Seller") and _____ a corporation of the State of _____ (hereinafter referred to as "Buyer"):

WITNESSETH

WHEREAS, Buyer desires to obtain an additional supply of natural gas to supplement and augment the supply now under contract to Buyer; and

WHEREAS, Seller owns or controls or will attempt to develop gas reserves underlying lands and leaseholds within the area set forth in Exhibit "A" hereof, from which it desires to sell gas attributable to Seller's interest to Buyer under the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the mutual covenants hereof, the parties agree together as follows:

ARTICLE I

DEFINITIONS

1. The term "Gas-Well Gas" shall mean the full well effluent in its natural state as produced from a gas well, as herein defined.

2. The term "Gas-Well Separator Residue Gas" shall mean that part of the effluent in its natural state as produced from a gas well, as herein defined, which remains in the gas phase at the gas outlet of an oil and gas separator.

3. The term "Gas" shall mean:

(a) "Gas-Well Gas", as herein defined in Section 1 of this Article I, if and when delivery is made hereunder direct from the mouth of the well, or

(b) "Gas-Well Separator Residue Gas", as herein defined in Section 2 of this Article I, if and when delivery is made hereunder at the gas outlet of the oil and gas separator.

4. The term "Gas Well" shall mean a well including the unit acreage designated thereto which produces gas only, or gas and liquids, and which well does not qualify as an oil well under the rules and regulations of the ——— Corporation Commission or successor jurisdictional bodies. A well completed in and producing from more than one horizon shall be considered as a separate well in each such horizon.

5. The term "accounting year" shall mean each calendar year hereunder commencing with January 1 after the date of first delivery of gas and the period of less than a calendar year from the date of first deliveries hereunder to December 31 of that year and from the end of the last calendar year preceding termination to the date of termination hereof.

6. The term "day" shall mean the 24-hour period commencing at seven o'clock (7:00) a.m. ——— Time.

7. The unit of volume for all purposes hereunder, unless otherwise specified, shall be one cubic foot of gas at a base temperature of sixty (60) degrees Fahrenheit and at an absolute pressure of fourteen and sixty-five one-hundredths (14.65) pounds per square inch.

ARTICLE II

RESERVATIONS OF SELLER

1. Seller hereby expressly reserves and excepts from the terms of this Agreement such portion of the gas produced from leases to be identified by Seller within the area set forth on Exhibit "A" hereof as may be required in Seller's opinion as a prudent operator for plant fuel and shrinkage, lease fuel, drilling, deepening, reworking, compression, operating, gas lifting, and obligations to its lessors. The reservations provided for under this Section shall be limited to uses on or associated with Seller's leases or properties under contract with Buyer.

2. The obligations of Seller hereunder are subject to the ability of Seller's wells to produce without waste and in accordance with prudent oil and gas field practice, and the control and operation of Seller's lands and leaseholds producing gas to be sold to Buyer hereunder shall remain the exclusive right of Seller including without limitation the right to determine when, where, or whether to drill new wells, to repair and rework old wells, and to abandon any well or surrender any lease when no longer deemed by Seller to be capable of producing gas in paying quantities under normal methods of operation. It shall be Seller's responsibility to operate all wells, and install and operate all equipment and piping up to the point of delivery.

3. During the first three (3) years from the date of initial delivery of gas hereunder, Seller shall have the right to elect to process or have processed prior to delivery, during the remaining term hereof, the gas deliverable to Buyer hereunder and thereby remove any constituents thereof other than methane (except such methane as is necessarily removed from the gas in the process of removing other constituents), so long as such processing does not lower the quality of the residue gas remaining after such processing below that required in Article VII hereof. Processing of gas committed hereunder shall be under conditions acceptable to both parties. Title to all products so removed shall remain vested in Seller.

ARTICLE III

GAS AFFECTED

1. Subject to the provisions of Article II hereof, and except as provided below, it is understood that the gas available for sale and delivery hereunder is the gas not heretofore committed to Buyer or others and which is attributable to Seller's interest in the lands and leaseholds now owned or hereafter acquired by Seller within the area set forth on Exhibit "A" hereof and which is produced from said lands pursuant to the terms of this Agreement during the term hereof.

Seller will make available to Buyer such information as to leases and basic data relating to reserves which Seller has available, including information as to contracted quantities of gas, if any, from lands within the area set forth on Exhibit "A" hereof which will be required prior to the time Buyer is obligated to take gas hereunder, to fulfill Seller's other commitments with purchasers.

Seller and buyer mutually agree that as of the date hereof the reserves of Seller available for delivery from the lands outlined on Exhibit "A" were 0.180 billion cubic feet, which shall constitute the original determination of reserves for the purpose of this Agreement.

Buyer shall connect to wells completed hereunder within sixty (60) days of written notice by Seller to Buyer of said completion, such notice to be accompanied by logs, completion and test data and other pertinent information including ownership which is not deemed to be of confidential nature by Seller. Should Buyer fail to connect within such 60-day period to any said well which is economically feasible to connect, then Buyer shall from the end of said 60-day period begin paying for the quantity of gas which said well would have been entitled to deliver if connected. For the purpose of this provision it is assumed that the heating value of the gas that would have been delivered is 1,000 B.T.U. per cubic foot. Notwithstanding the foregoing, Buyer shall not be obligated to connect to any well now or hereafter drilled in the acreage under contract hereunder with Buyer which cannot be economically connected to Buyer's pipeline system and any reserves attributable to such well shall be excluded from any reserve determination made under this Article III in which event said well and committed acreage attributable thereto shall, upon Seller's written request to Buyer, be released from this Agreement. With respect to any well completed hereunder, Buyer shall have thirty (30) days from the date of Seller's written notice of completion to determine the economic feasibility of connecting such well to buyer's gathering system. In the event that Buyer does not notify Seller within such thirty (30) day period as to whether it is economically feasible to connect such well to its system, it shall be deemed that such connection is economically feasible.

Buyer agrees, for the purpose of this Agreement, that it is economically feasible to connect to any well which has reserves committed hereunder of not less than one (1) billion cubic feet for each mile of pipeline required to connect with Buyer's facilities.

2. Buyer and Seller agree that when a new well is completed and connected to Buyer's gathering system the term hereof Seller's interest in the reserves committed under this Agreement and attributable

to such new well shall be added to the then current determination of reserves, and such new determination shall be used in computing the takes hereunder, provided Buyer has the physical and certificated capacity to take additional gas as may thus be required. In addition, Buyer or Seller may request at reasonable intervals, but not more frequently than once each year, during the term hereof, a redetermination of all of the reserves committed hereunder. Should the reserves of Seller be found on any such redetermination to exceed the reserves theretofore determined hereunder, then such excess reserves of portion thereof shall be deemed a portion of Seller's reserves subject to the performance of this Agreement. Any such determination shall take the place of the previous determination and beginning with the first full accounting month after the date of any such redetermination shall be used in computing the takes hereunder, provided Buyer has the physical and certificated capacity to take additional gas as may thus be required. If Buyer cannot take additional gas as may be required by reserves attributable to new wells or by a redetermination, because of having insufficient physical or certificated line capacity, Buyer shall promptly file and prosecute diligently an application with the Federal Power Commission for authorization to obtain the additional capacity required to take the additional gas. Buyer agrees to proceed with due diligence to construct the facilities authorized and, upon their completion, Buyer shall be obligated to take or pay for such additional gas. In the event Buyer does not obtain Federal Power Commission authorization for such additional capacity within one year after the date of making application therefor, then, at the election of Buyer, Buyer shall be obligated to either pay each month thereafter for such additional gas or release such additional gas and acreage attributed thereto, from this Agreement.

Buyer shall give Seller written notice of such election within ten (10) days after the end of such one-year period or within sixty (60) days after the issuance of any Federal Power Commission order rejecting or denying Buyer's application for such additional capacity, whichever date is the earlier. Any determination or redetermination of the reserves shall remain in effect until such time as a subsequent redetermination is made.

3. If after negotiations pursuant to the provisions of Section 2 of this Article, Buyer and Seller shall be unable within ninety (90) days after the start of such negotiations to agree on a redetermination of the net recoverable gas reserves of Seller to be sold hereunder, the same upon written notice by either party to the other shall be determined by an Independent Engineer mutually acceptable to Seller and Buyer. Any determination made by such Independent Engineer shall be final and binding on the parties hereto. The fee and the expenses of such Independent Engineer shall be equally divided between Buyer and Seller. In the event Buyer and Seller cannot agree upon an Independent Engineer, the same shall be determined by arbitration in the following manner. Buyer shall appoint one arbitrator and Seller shall appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator. If either Buyer or Seller shall fail to appoint an arbitrator within ten (10) days after a request for such appointment is made by the other party in writing, or if the two arbitrators so appointed shall fail within ten (10) days after the appointment of the second of them

to agree on a third arbitrator, the arbitrator or arbitrators necessary to complete a board of three arbitrators shall be appointed upon application by either party therefor by the United States District Judge, senior in point of service, of the Federal Judicial District in which the property covered by this Agreement is situated. In the event such Judge within thirty (30) days after application thereto should fail or refuse to act, then either party hereto may request the American Arbitration Association to select the arbitrator or arbitrators to complete the board of three. After three arbitrators are appointed pursuant to the foregoing provisions of this Section they shall meet, hear the parties with respect to the matter of said net recoverable gas reserves, and arrive at a determination of said net recoverable gas reserve.

Any redetermination agreed to in writing by at least two of said arbitrators shall be final and binding on the parties hereto. All arbitrators appointed pursuant to this Section shall be qualified independent engineers experienced in the oil and gas industry and competent to pass on the matter of said net recoverable gas reserves. Each party shall pay the expense of the arbitrator selected by or for it, and its counsel, witnesses and employees, and all other costs of the arbitration shall be equally divided between the parties hereto.

ARTICLE IV

QUANTITY

1. Seller agrees to sell and deliver to Buyer and Buyer agrees to purchase and take from Seller hereunder or pay Seller for, whether taken or not, during each accounting year an average daily quantity of gas attributable to Seller's interest committed hereunder, equal to one million (1,000,000) cubic feet for each seven billion three hundred million (7,300,000,000) cubic feet of reserves as established under Article III hereof, and adjusted as hereinafter set forth, provided Seller is able to develop and maintain a daily deliverability equal to one hundred twenty-five (125) per cent of such average daily quantity. If the volume of reserves shall either increase or decrease as a result of any determination made in accordance with Article III hereof, said quantity of gas shall be adjusted in accordance with the provisions of this Section 1. Subject to the other provisions of this Article IV, so long as allowables are set for wells, Buyer further agrees to nominate in the aggregate for each yearly period at least one million (1,000,000) cubic feet daily for each seven billion three hundred million (7,300,000,000) cubic feet of the aggregate net recoverable gas reserves committed hereunder.

For all purposes in connection with the obligations of Seller to deliver and Buyer to take gas hereunder, net recoverable reserves as of any determination under Article III hereof shall be adjusted by adding thereto the total gas delivered hereunder to date of said determination from the acreage for which determination was made. Notwithstanding the provisions set out in this Section 1 to the contrary, during the first 60 months from the date of initial delivery hereunder, the average daily quantity for this Agreement shall be either the aggregate volume obtained when adding the results of multiplying Seller's interest committed hereunder in each well connected by Buyer times two

million (2,000,000) cubic feet or one million (1,000,000) cubic feet for each three billion six hundred fifty million (3,650,000,000) cubic feet of reserves as established under Article III hereof, whichever is the greater.

2. Except as permitted by Seller, Buyer agrees that its take of gas hereunder during any one day shall never be less than seventy-five (75) per cent nor more than one hundred twenty-five (125) per cent of the average daily quantity set forth in Section 1 above.

3. Should Seller be unable to develop or to maintain for a period of thirty (30) days a deliverability equal to one hundred twenty-five (125) per cent of the average daily quantity set forth in Section 1 above, then in that event said average daily quantity shall be reduced to eighty (80) per cent of the deliverability which Seller is able to develop and maintain; provided, however, that Seller shall have the right at any time to reestablish an average daily quantity based upon the rate of taking provided for in Section 1 above by restoring deliverability equal to at least 125% thereof.

4. If the total volume of gas actually purchased and taken by Buyer during any accounting year shall be less than the required quantity as provided in Section 1 above then Buyer shall within thirty (30) days after the end of such accounting year pay Seller for such deficiency gas not taken, said payment being at the price existing at the end of such accounting year adjusted for the average Btu content during the period such deficiency occurred. Buyer shall have the right to take such deficiency gas at any time during the remaining term of this Agreement. The price to be paid for deficiency gas shall be the base price in effect at the time such deficiency gas is actually taken plus Btu adjustment less the price plus Btu adjustment previously paid by Buyer to Seller for such deficiency gas at the end of the accounting year in which such deficiency occurred. The quantity of such deficiency gas or any gas in excess of such deficiency quantity so taken by Buyer shall not be treated as a part of the quantity of gas which Buyer is obligated to take or pay for during such succeeding accounting years, nor shall Seller be obligated to deliver a total quantity of gas on any one day in violation of applicable valid field rules and regulations or in excess of one hundred twenty-five (125) per cent of the average daily quantity required in Section 1 above.

5. If withdrawals by others from a reservoir or common source of supply containing reserves under contract to Buyer hereunder cause drainage of Seller's reserves, Buyer shall use its best efforts to increase, and upon receipt of written notice from Seller to Buyer shall be obligated to increase within the limits of the physical and certificated capacity of its facilities, its receipts of gas therefrom to the extent necessary to equalize withdrawals and prevent such drainage. In the event such capacity of Buyer's facilities is not sufficient to handle the increase in volume necessary to prevent drainage of Seller's reserves and Buyer does not elect to make available the necessary additional capacity, then Seller reserves the right to sell and dispose of such gas which Seller, in its sole judgment and in good faith, deems it necessary or advisable to sell in order to equalize its withdrawals with withdrawals of gas by others so as to prevent undue migration or drainage of gas by others. In the event Seller is required to sell gas to others to protect its leases from drainage, Buyer shall, if such action is requested by Seller, re-

lease from this contract up to seven billion three hundred million (7,300,000,000) cubic feet of gas for each one million (1,000,000) cubic feet of gas which Seller is required to sell daily to protect its leases from drainage; provided that during the first 60 months from the date of initial delivery hereunder, Seller shall not be required to release hereunder more than three billion six hundred and fifty million (3,650,000,000) cubic feet of gas for each such one million (1,000,000) cubic feet of gas. If Buyer purchases from others gas produced from a reservoir or common source of supply containing reserves under contract to Buyer hereunder, Buyer agrees to equalize withdrawals ratably so as to protect any of the Seller's said reserves from drainage by its withdrawals from others.

ARTICLE V

CERTIFICATION AND RIGHT OF TERMINATION

1. Seller and Buyer will file promptly with the Federal Power Commission and prosecute diligently any necessary applications for certificates of public convenience and necessity authorizing Seller to initiate and carry on the sale of gas covered hereunder and authorizing Buyer to construct and operate the facilities required to accept and transport said quantities of gas. If either party shall fail to obtain or, upon obtaining, not accept any requisite authority from the Federal Power Commission within twelve (12) months after making application therefor, then either party may cancel this Agreement.

ARTICLE VI

DELIVERY AND TERM

1. Following the receipt and acceptance by both parties of any authorizations required by the Federal Power Commission, both parties agree to commence and proceed with reasonable diligence to construct the facilities required to deliver and receive gas in accordance with the terms of this Agreement.

2. Unless terminated as herein provided, this Agreement shall remain effective for a period of twenty (20) years from the date of initial delivery or the date Buyer is obligated to take or pay for gas hereunder, whichever is earlier.

ARTICLE VII

QUALITY OF GAS

1. Buyer may, but shall not be obligated to purchase and receive gas from Seller under the terms of this Agreement unless such gas shall conform to the following specifications:

(a) The gas shall be commercially free from dust, gum, gum-forming constituents, condensate, and other liquids and solids which may become separated from gas.

(b) The gas shall not at any time have an oxygen content in excess of one (1) per cent by volume and Seller shall make every reasonable effort to keep the gas free of oxygen.

(c) The gas shall not contain more than 0.25 grain of hydrogen sulphide per one hundred (100) cubic feet. The hydrogen sulphide content shall be as determined by a cadmium sulphate Iodometric Titration method (NGPA Publication #2265-68 or as the same may be revised) or an electrolytic titrator.

(d) The gas shall not contain more than twenty (20) grains of total sulphur (including the sulphur in any hydrogen sulphide and mercaptans) per one hundred (100) cubic feet.

(e) Except with the consent of Buyer, the gas shall have a total heating value per cubic foot of not less than one thousand (1,000) nor more than twelve hundred (1,200) British thermal units. The term "total heating value per cubic foot" shall mean the number of British thermal units, produced by the combustion at constant pressure, of the amount of gas, saturated with water vapor, which would occupy a volume of one (1) cubic foot at a temperature of sixty (60) degrees Fahrenheit and under pressure equivalent to that of thirty (30) inches of mercury at thirty-two (32) degrees Fahrenheit and under the standard gravitational force with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of gas in air and when the water formed by combustion is condensed to a liquid stage.

(f) The water content of the gas shall not be more than six (6) pounds per million cubic feet of gas measured at a pressure of 14.7 pounds per square inch absolute and sixty (60) degrees Fahrenheit temperature, as determined by mutually acceptable apparatus and procedure.

2. Should the gas offered for sale to Buyer fail at any time to conform to any of the specifications of this Article, Buyer shall notify Seller of any such failure and Seller shall make a diligent effort to correct such failure so as to deliver gas conforming to the above specifications. If Seller is unable to deliver gas conforming to the above specifications by treatment consistent with prudent operations and by means which are economically feasible in Seller's opinion, Buyer may at its option accept delivery of the gas and treat the gas so that it will conform to the above specifications. Failure of Buyer to accept gas not meeting specifications for a period of thirty (30) consecutive days shall give Seller or Buyer the right to cancel and terminate this Agreement upon ten (10) days' written notice insofar as it relates to the gas not meeting such specifications.

ARTICLE VIII

POINTS OF DELIVERY

1. The points of delivery of gas from the lands set forth on Exhibit "A" hereof shall be, at Seller's option, either at the wellhead of each well or at the outlet of the well separator, if any. Title to all gas sold hereunder shall pass from Seller to Buyer at said points of delivery.

ARTICLE IX

DELIVERY PRESSURE

1. Seller shall deliver the gas at a pressure sufficient to allow the gas to enter Buyer's gathering system at the delivery points hereunder,

provided that Seller shall not be required to deliver gas to Buyer at a pressure in excess of one thousand one hundred (1,100) p.s.i.g. Should the natural well pressure of any well be insufficient at any time to allow delivery to Buyer at its then prevailing gathering line pressure, then, at the option of either Buyer or Seller, the gas attributable to such well and acreage attributed thereto may be removed from the terms and conditions of this Agreement provided, however, that either party may at its option elect to compress at its sole expense. Notice of such election to compress by either party to the other and commencement of compression within one hundred eighty (180) days after such election shall suspend during said one hundred eighty (180) days the right of the party receiving said notice to cause the gas attributable to such deficient well to be removed from the terms and conditions hereof.

ARTICLE X

MEASUREMENTS AND TESTS

1. Standard of measurements and tests:

(a) Except as provided in paragraph (b) below relating to deviation, the volume of gas delivered hereunder shall be computed in accordance with the methods prescribed in the Gas Measurement Committee Report # 3, Natural Gas Department, American Gas Association, including the Appendix thereto, dated April, 1955, and any subsequent amendments thereof which are mutually acceptable to the parties hereto.

(b) The deviation of the gas from the Ideal Gas Laws at the pressures and temperatures under which gas is delivered hereunder, shall be determined by use of Burnett type apparatus or if Buyer and Seller mutually agree the determination shall be made by the methods prescribed by the Gas Measurement Committee Report # 3 referred to in Section 1 of this Article X. Such determination shall be made at the beginning of delivery hereunder and at such times thereafter as either party hereto may desire, but not more frequently than each six (6) months. Results of each such determination shall be used in computing the volumes of gas delivered hereunder until the next such determination is made.

(c) The specific gravity of the gas at the point of delivery shall be determined every six (6) months by joint tests or as much oftener as is found necessary in practice. The method of test used shall be by gravity balance or by such other methods as shall be agreed upon by the parties. The regular tests, at the first of each six (6) month period shall determine the specific gravity to be used in the computations for the measurement of gas deliveries during such period or until changed by special tests, the special tests to be applicable from the date made and through the following days to and including the last day of such period or until further special tests are made.

(d) Flowing temperature of the gas at the point of delivery shall be determined by means of a recording thermometer of standard make acceptable to both parties and the arithmetical average of readings during the time gas is flowing each day shall be deemed the gas temperature and used in computing the volumes of gas delivered during such day.

(e) The heating value of the gas delivered hereunder shall be determined at each delivery point hereunder at least once a year and, at

the request of either party, at such other times as prudent operating conditions may require, by means of a calorimeter using the Thomas Principle of calorimetry or its equal.

(2) Measurement:

(a) For the purpose of calculating the volume of gas delivered hereunder and for other purposes of establishing volume where applicable and in the computation of such volumes, the atmospheric pressure shall be assumed to be thirteen and five-tenths (13.5) pounds per square inch absolute regardless of the actual atmospheric pressure at which the gas is delivered and measured unless otherwise established by governmental authority.

(b) Buyer shall install, maintain and operate at its own expense at or near the points of delivery set forth in Article VIII, Section 1, hereof, the necessary equipment of a character and design acceptable to Seller to measure separately the volume of gas produced separately from each reservoir or formation, and perform all tests required to accomplish the measurement of volumes, temperatures, and specific gravity, and heating values of the gas delivered hereunder. Such measuring equipment shall conform to the specifications contained in the Report designated in Section 1(a) of this Article X. Seller shall have access to such measuring equipment at all reasonable hours, but the calibrating and adjusting thereof and changing of charts shall be done only by Buyer. Upon request of Seller, all volume, specific gravity, and temperature charts used in the measurement of gas hereunder shall be mailed or delivered to Seller for checking and calculating within twenty (20) days after the last chart for each billing period is removed from the meter. Such chart shall be mailed or returned to Buyer within thirty (30) days after receipt thereof by Seller.

(c) Seller may install, maintain and operate such check measurement as it may desire but same shall not interfere in any way with the operation of Buyer's measurement equipment hereunder and all calibrating and adjusting of Seller's meters and changing of charts shall be done by Seller.

(d) Seller and Buyer shall each have the right to be present at the time of installing, testing, cleaning, changing, repairing, inspecting, calibrating or adjusting done in connection with the measuring equipment of the other which is used in measuring deliveries hereunder; and the party which is planning to conduct such operations shall give the other party at least ten (10) days' prior notice thereof in order that it may be present.

(e) If, for any reason, Buyer's measuring equipment is out of service or out of repair so that the quantity of gas is not correctly indicated by the reading thereof, the gas delivered during the period such measuring equipment is out of service or repair shall be estimated and agreed upon on the basis of the best data available, using the first of the following methods which is feasible:

(i) By using the registration of any check measuring equipment if installed and accurately registering; or

(ii) By correcting the error if the percentage of error is ascertainable by calibration, tests or mathematical calculations; or

(iii) By estimating the quantity of deliveries by comparison with deliveries during preceding periods under similar conditions when the meter was registering accurately.

(f) The accuracy of the measuring equipment at the place of delivery shall be tested at reasonable intervals of not less than once a month and whenever requested by Buyer or Seller.

If any such test shall be requested by Seller, and, upon such test, the measuring equipment in question shall be found to be registering correctly, the cost of such test shall be charged to and borne by Seller; otherwise, the cost of all such tests shall be borne by Buyer.

(g) If upon any test, the measuring equipment in the aggregate is found to be inaccurate by two (2) percent or less, previous readings of such equipment shall be considered correct in computing the deliveries of gas hereunder but such equipment shall be immediately adjusted to record accurately. If upon any test the measuring equipment in the aggregate shall be found to be inaccurate by more than two (2) percent, then and in that event any previous readings of such equipment and any payments based on such previous readings, shall be corrected to zero error for any period which is definitely known or agreed upon, but if the period is not definitely known and agreed upon such corrections shall be for a period covering the last half of the time elapsed since the last test.

(h) Buyer shall preserve or cause to be preserved for a period of at least three (3) years all test data, charts, or other similar records for the mutual use of both parties.

ARTICLE XI

PRICE

1. From the date of the commencement of the primary term hereof, Buyer shall pay Seller for gas at each point of measurement, for a period of one (1) year for all gas delivered hereunder, or for which payment is due from Buyer hereunder, a base price of 51¢ per Mcf for gas having 1,000 B.T.U.'s per cubic foot.

Thereafter during each one-year period or portion thereof during the remaining term of this Agreement the base price during each such one-year period or portion thereof shall be increased 1.0¢ per Mcf over the immediately preceding one-year base price; except that with respect to the deficiency gas resulting from Seller's cycling or pressure maintenance operations (as provided for in Article II, Section 1 and Article IV, Section 2) the base price to Buyer for such gas, when delivered, shall be the base price in effect at the time such deficiency occurred.

2. Should the heating value of the gas delivered hereunder be found on any determination pursuant to Section 1(e) of Article X hereof to be more or less than 1,000 B.T.U.'s per cubic foot, the base price provided for in Section 1 of this Article shall be adjusted by multiplying such price otherwise payable by a fraction whose numerator is the actual B.T.U. of the gas delivered hereunder and whose denominator is 1,000.

3. If the Federal Power Commission, or any successor governmental authority having jurisdiction in the premises, shall at any time prescribe, for the area in which Seller's properties are situated, a higher just and reasonable area rate for the purchase of gas than the price herein provided to be paid, then the price to be paid by Buyer to Seller for gas delivered under the provisions of this Agreement shall be increased, effective as of the date such higher price is prescribed, to

equal such higher rate; provided, however, that Buyer shall have the right at its option to intervene in any area rate proceeding held to give consideration to any area rate higher than those provided for herein, to oppose any such higher area rate, and in the case of any such higher area rate becoming effective, to seek relief from any regulatory agency or any court having jurisdiction, but such relief, if obtained, shall not result in a price hereunder which is less than the price set out in this Article.

ARTICLE XII

BILLING AND PAYMENT

1. After deliveries of gas have commenced under the terms of this Agreement, Buyer shall, on or before the twentieth (20th) day of each month, render to Seller a statement showing the quantity of gas delivered (from each point of measurement and the value thereof calculated under the provisions of Articles X and XI thereof) during the preceding calendar month, and any adjustments made by Buyer including deductions, if any, for gas previously paid for but not taken, accompanied by a check in payment of the amount due based on such statement.

2. Should Buyer fail to pay the full amount due to Seller when the same is due, interest thereon shall accrue at the rate of six (6) per cent per annum from the date when such payment is due until the same is paid. If such default in payment continues for sixty (60) days after written notice sent by registered United States mail from Seller to Buyer, Seller may, at its election, to be exercised at any time while such default continues, and in addition to all other remedies, on thirty (30) days' written notice to Buyer, suspend deliveries of gas hereunder and may cancel and terminate this Agreement; provided, however, that the provisions for suspending deliveries or terminating this Agreement shall not apply if Buyer's refusal to pay any amount claimed by Seller is the result of a bona fide dispute and Buyer pays all amounts not in dispute and furnishes adequate security to Seller for payment of the amounts in dispute until the final determination of the dispute.

3. Each party shall have the right at reasonable hours to examine the books, records and charts of the other party to the extent necessary to verify the accuracy of any statement, charge, or computation made pursuant to the provisions of any article hereof. If any such examination reveals any inaccuracy in any billing theretofore made, the necessary adjustment in such billing and payments shall be promptly made, provided that no adjustment for any billing or payment shall be made after the lapse of two (2) years from the rendition thereof unless challenged prior thereto.

ARTICLE XIII

WARRANTY

1. Seller warrants title to all gas sold hereunder, that it has the right to sell the same, and that such gas is free from liens and adverse claims of every kind. Seller will pay or cause to be paid, all royalties, taxes and other sums due on production, gathering or handling of the gas delivered by such Seller. Seller will indemnify and

save Buyer harmless against all loss, damage and expense of every character on account of adverse claims to the gas delivered by it or of royalties, taxes, payments or other charges thereon applicable before or upon delivery to Buyer. In the event any adverse claim of any kind is asserted with respect to any of said gas or monies due Seller therefor, Buyer may retain as security for the performance of the obligations of Seller, any such monies, without interest, until such claim has been finally determined, or until Seller shall have furnished bond to Buyer in an amount and with sureties satisfactory to Buyer, conditioned for the protection of Buyer with respect to such claim.

ARTICLE XIV

LIABILITY

1. As between the parties hereto, Seller shall be in control and possession of its gas deliverable hereunder and responsible for any damage or injury thereby until same shall have been delivered to Buyer at the points of delivery, after which delivery Buyer shall be in exclusive control and possession thereof and responsible for any injury or damage thereby.

ARTICLE XV

FORCE MAJEURE

1. If either Buyer or Seller is rendered unable, wholly or in part, by force majeure or any other cause of any kind not reasonably within its control to perform or comply with any obligation or condition of this Agreement, upon giving notice and reasonably full particulars to the other party such obligation or condition shall be suspended during the continuance of the inability so caused and such party shall be relieved of liability and shall suffer no prejudice for failure to perform the same during such period; provided, obligations to make payments then due for gas delivered hereunder shall not be suspended and the cause of suspension (other than strikes or lockouts) shall be remedied so far as possible with reasonable dispatch. Settlement of strikes and lockouts shall be wholly within the discretion of the party having the difficulty. The term "force majeure" shall include, without limitation by the following enumerations, acts of God and the public enemy, the elements, fire, accidents, breakdowns, strikes and any other industrial, civil or public disturbance, inability to obtain materials, supplies, permits or labor, any act or omission (including failure to take gas) of a purchaser of gas from Buyer which is excused by any event or occurrence of the character herein defined as constituting force majeure, temporary failure of gas supply, and any laws, orders, rules, regulations, acts or restraints of any government or governmental body or authority, civil or military. The term "force majeure" shall not include the rights of termination provided for in Article V hereof.

ARTICLE XVI

ASSIGNMENT

1. The terms, covenants, and conditions hereof shall be binding on the parties hereto, their successors, and assigns.

2. It is provided, however, that no assignment of this Agreement shall be made without prior consent of one to the other, except that assignments may be made without such consent to secure the payment of money.

ARTICLE XVII

NOTICES

1. Any notice, request, demand, statement or payment provided for in this Agreement shall be sent to the parties hereto at the following addresses:

BUYER—

SELLER—

Any notices and request or demand shall be deemed to have been made hereunder at such time as same have been deposited in the United States mail postage prepaid.

2. Either party may change such address under this Article XVII by giving prior notice to the other party.

ARTICLE XVIII

REGULATION

1. This Agreement is subject to present and future orders of duly constituted authorities having jurisdiction or control over the parties, their facilities, gas supply, operations, or this Agreement or any provisions thereof, and in the event this Agreement or any provisions thereof shall be found contrary to, or in conflict with any such law, ordinance or regulation, the latter shall be deemed to control, but on the cessation of any jurisdiction or control, all rights and obligations as set forth in this Agreement shall again pertain. Either party shall have the right to contest the validity of any such law, order, rule or regulation and acquiescence therein or compliance therewith for any period of time shall not be construed as a waiver of such right. Nothing in this Agreement shall be construed to require Seller to waive its right to assert lack of jurisdiction of the Federal Power Commission over Seller or over the sale of gas hereunder or to assert that it has no facilities subject to said Commission's jurisdiction.

ARTICLE XIX

TAXES

1. Buyer shall reimburse Seller for all present production, gathering, delivery, sales, severance or other excise taxes (except income or payroll taxes) or taxes or assessments of a similar nature now imposed or levied by the state in which this gas is produced or other governmental agency or duly constituted authority upon said gas as produced, sold or delivered hereunder, assessed against Seller. If at any time after the execution of this Agreement, there is imposed against Seller, any new or increased rate of existing taxes upon or in

respect to the production, gathering, severance or delivery of the gas sold hereunder or the value thereof, then from and after the imposition of such additional taxes, Buyer shall in addition reimburse Seller all of the calculated amount of such increased or new tax or taxes borne by Seller. Such reimbursement shall apply to the royalty interest as well as the working interest provided that Seller passes such reimbursement on to such royalty interest. Any present or future tax levied on any liquid product which Seller is entitled to retain shall be borne wholly by Seller.

ARTICLE XX

GENERAL

1. The failure of either party hereto to exercise any right granted hereunder shall not impair nor be deemed as a waiver of such party's privilege of exercising such right at any subsequent time or times.

2. All headings appearing herein are for convenience only, and shall not be considered a part of this Agreement for any purpose or as in any way interpreting, construing, varying, altering, or modifying this Agreement or any of the provisions hereof.

3. It is understood that certain of Seller's properties subject hereto are now or may hereafter be subject to agreements providing for the pooling, joint operation and/or unitization of said properties and the gas to be delivered by Seller to Buyer hereunder shall be the gas attributable and allocated to Seller under the terms of said agreement or agreements as a result of the leases committed thereto.

4. Seller grants to Buyer, so far as Seller has the right so to do, right-of-way on the lands and leaseholds set forth on Exhibit "A" for Buyer's pipe lines and other equipment, as may be necessary, with full right of ingress and egress to and from said premises, and the further right to do thereon acts necessary or convenient for the carrying out of the terms of this Agreement. All pipe lines and equipment placed on the lands and leaseholds set forth on Exhibit "A" by Buyer shall be and remain its property and be subject to removal by it at any time.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in quadruplicate originals as of the day and year first above written.

WITNESSES:



PART IV

MINORITY VIEWS OF HONORABLE JAMES M. COLLINS

INCREASING PUBLIC PARTICIPATION

As I have expressed in earlier segments of this report, I have serious doubts about the need for the recommendations made in the report for such things as the Agency for Consumer Advocacy (ACA), Offices of Public Counsel, and public funding for so-called consumer groups. Before I go any further on this subject, however, I want to say quite specifically that I also favor public participation in agency proceedings. I believe that it is important for differing points of view to be placed before the agencies. I quite simply have misgivings about the recommendations made in this report, because I do not believe that the report's evidence in support of these recommendations warrants their adoption.

Quite frankly, I am not certain that the implementation of these recommendations would enhance the ability of the agencies to serve the public interest. There is no cost estimate for this total package of recommendations in the report. I, for one, do not buy things until I know what they will cost, and with the growing burden on taxpayers via Federal income taxation, I believe that it would be irresponsible for me to buy the Subcommittee's recommendations. These recommendations are massive, and they certainly appear to me to be expensive. I am not so sure that if we implemented each and every one of these recommendations that things would be materially better. They may be materially worse as a result.

The Subcommittee report in an attempt to illustrate a need for increased public participation of the variety that it favors cites three case studies: (1) involving FDA, (2) involving NHTSA, and (3) involving the FPC.

The NHTSA case, discussed in the report as involving "burnable car fabrics", is an example of already effective consumer participation and not the lack thereof, because as the Subcommittee report points out: "The Center's (Center for Auto Safety) advocacy was instrumental in convincing NHTSA to retain its proposed rule." How this case study can be used to prove a need for an ACA or an Office of Public Counsel, I really do not know. What it illustrates to me is that there is already in place "consumer" group representation which is effective. The Center for Auto Safety as this case study shows took on General Motors, Ford Motor, and Chrysler and won.

In the FPC case cited, involving Opinion No. 770, the report states that the new gas rate ordered by this Opinion, "was reached without the benefit of any public and in fact without any substantial direct contribution from outside the Commission." This statement is not only absurd, but is patently so. As Mr. Krueger and I pointed out in

our dissenting views to the Chapter on the Federal Power Commission, there were no less than 61 groups and persons representing consumer interests intervening in that FPC proceeding. These persons and groups participated not only in the proceedings before the order was issued but also in the rehearing proceedings. This massive infusion of public participation, again, does not make the case for the recommendations made in the Subcommittee report.

The report goes on to say that: "Predictably the decision had several weaknesses revealed by the Subcommittee's hearings on the matter on August 27, 1976." I find this to be a very interesting statement for several reasons. First, Mr. Ottinger, Mr. Maguire, Mr. Moffett, and Chairman Moss, all Members of this Subcommittee, are intervenors in this case. They had two opportunities to present their views to the Commission. In the first instance, they had the opportunity to present any evidence or thoughts to the Commission prior to a decision being made. Additionally, after the Commission had reached a decision, it granted a petition for rehearing to look at the decision anew. At this juncture, which I hasten to point out was after all of these "alleged weaknesses" were revealed, there was a further opportunity for these intervenors to make their points of view known to the Commission. Again, on the basis of this record, I am not convinced that we need those things recommended in the Subcommittee report. The facts in this report simply do not support the recommendations. To paraphrase the Subcommittee report there was an opportunity in Opinion No. 770 and its proceedings to have important interests considered sufficiently, and there was an effective way to present those views forcefully.

Furthermore, with respect to Opinion No. 770, Mr. Krueger and I discussed at some considerable detail in our dissenting views to the Chapter on the Federal Power Commission the so-called weaknesses in Opinion No. 770 and as we pointed out, these alleged weaknesses were not weaknesses after all. They were perceived weaknesses and that perception, as Mr. Krueger and I demonstrated, resulted from a fundamental misunderstanding on the part of the Majority of the Opinion as well as the relevant Federal income tax law.

The Subcommittee Majority quoted a statement made by Mr. Morton Simons at one of our Subcommittee hearings in support of their case. Mr. Simons is a Washington attorney who has effectively represented consumer interests before the FPC for many years, and although I do not always agree with Mr. Simons' conclusions on issues, I have always found him to be a forceful and effective advocate for his position, who presents his position with honesty. However, Mr. Simons' statement cannot be used to demonstrate a need for an ACA or an Office of Public Counsel. The point made in Mr. Simons' statement is that rate order proceedings should not be made as a result of a rulemaking procedure, but should be accomplished via an evidentiary hearing. This has nothing to do with the recommendations made in the Subcommittee report and is thus irrelevant to the discussion. In the section of this Chapter dealing with the need for more public participation, the report cites a 1960 study indicating that the agencies "daily activities often consist of extensive exchanges with members of that (regulated) industry." I believe that if that study were updated to 1976 it would conclude that the agencies' daily activities often consist of extensive exchanges with members of that industry and representatives of consumer groups.

I believe that there is very little activity in this Government of any

significant import that is escaping the attention of consumer groups. They testify before Congress on a whole array of proposed legislation, they intervene in agency proceedings, and they bring lawsuits. The report then has not demonstrated to me any compelling need to adopt the recommendations.

QUALITY OF THE REGULATORS

My comments on this chapter of the report will not be extensive. I do, however, have some observations that I would like to make. The report lists certain criteria that the Majority would like to see utilized in the selection of regulators. Number five on the list is an unquestionable principle of professional integrity. This should be the first on any list of standards and should be given more weight than the other factors.

With respect to the remainder of this list of standards or criteria, I generally agree with them with the exception of standard number one which called for dividing the agencies into three factions: one group representative of the consumer or user, another group from government, and still another group from the regulated industry. I do not agree with this faction format, because I believe that if you select persons who comply with the other five standards the first one is totally unnecessary. It has not been demonstrated to me that the public interest cannot be best served by selecting men and women with high integrity and competence. Why do we necessarily have to pit one faction against another faction, or even select on a factional basis? This recommendation is superficially appealing, but I believe that it will create more problems than it solves. Why, for instance, should a person from the regulated industry be included or excluded from consideration because of his affiliation? If any person possesses the high degree of integrity called for in recommendation number five, as well as the knowledge and competence outlined in the other recommendations, they should be available for agency appointment whether they come from industry, government, or some consumer group. We are looking for the best possible regulators, not the best possible regulators from a given faction.

The Subcommittee report states: "During the past fifteen years fewer than 10 percent of the 120 persons appointed as Commissioners or Administrators of the nine subject agencies had, prior to their appointments, demonstrated a conspicuous sensitivity to the interest of consumers." The implication of this statement is that if the person was not a vocal consumer activist that we should place some sort of black mark on his record. Why must we always give credence to the loudest voices whether they make any sense when they speak or not? We are looking for highly competent people, and affiliation with Ralph Nader should not be considered a plus or a minus; the competence and the integrity of the person should be critical factors. That person's sensitivity or insensitivity to any interest group should be one factor considered by the President and the Senate. The logic of the report is that if a person has not demonstrated conspicuous sensitivity to consumer interests that person must, therefore, be insensitive to consumer interests. I believe instead that we should look for a conspicuous demonstration of competence and integrity or lack thereof in deciding who we choose as our regulators. I still believe that men and women of in-

tegrity and competence can serve the public interest: and when I mention the word integrity, I include within that definition intellectual integrity.

With respect to regulators who come from the regulated industry, just as with the person who comes from another source, competence and integrity should be the critical factors. The agencies that are discussed in this report were established to bring expertise to a given area that Congress believed needed that sort of expertise. In many instances, the only large repository of talent in this area would be a regulated industry, since a sufficient degree of expertise has not developed outside the regulated industry.

Affiliation with the regulated industry is often the only means available to acquire expertise. If a person has competence and integrity, why should association with a regulated industry be frowned upon. I have never looked with favor upon the concept of guilt by association. If a person has competence and integrity and they come from outside the regulated industry that person is qualified, and the same should be true if a person is coming from within the regulated industry.

JAMES M. COLLINS.

FEDERAL REGULATION AND REGULATORY REFORM

ADDITIONAL VIEWS OF HON. JOHN E. MOSS

- PART I—Introduction
Securities and Exchange Commission
Federal Trade Commission
Environmental Protection Agency
- PART II—National Highway Traffic Safety Administration
Consumer Product Safety Commission
Food and Drug Administration
- PART III—Federal Power Commission
- PART IV—Quality of Regulators
Increasing Public Participation
-
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The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β . It is shown that the system of equations (1) has solutions for arbitrary values of the parameters α and β if and only if the condition $\alpha + \beta = 1$ is satisfied.

In the second part of the paper the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β is solved.

The third part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β .

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The seventh part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β .

In the eighth part of the paper the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β is solved.

The ninth part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β .

In the tenth part of the paper the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β is solved.

The eleventh part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β .

In the twelfth part of the paper the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β is solved.

FEDERAL REGULATION AND REGULATORY REFORM

ADDITIONAL VIEWS OF HON. JOHN E. MOSS

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PART I

INTRODUCTION

My colleague James M. Collins, the ranking minority member, has offered minority views on the Subcommittee's report "Federal Regulation and Regulatory Reform." Initially we thank Mr. Collins for his kind remarks about the report and for his continuing cooperation in the work of the Subcommittee. We note the report was approved by a vote of 10 to 1, with one Member voting present.¹

The minority views express the belief that the report will serve as a useful research tool for the future. We agree, but would emphasize that the next step is not further research, but immediate efforts at early implementation of the report's recommendations.

We cannot agree with the premise put forward in the minority views that the agencies and their staffs as currently structured can adequately perform their function of representing the broad public interest in agency proceedings. The minority views acknowledge that:

- (a) regulated industries have the resources to "put forth their position forcefully";
- (b) this position is "often narrow" and therefore may not be in the public interest; and
- (c) a counterweight is therefore needed.

The minority reaches the conclusion that agency staff can provide this counterweight only by overlooking the extensive evidence presented in virtually every one of the report's 40 case studies. These case studies show that in too many cases, agency decisions disregard the consumer's interest. The list of examples is lengthy, and includes for instance:

(a) the SEC's lack of action in returning competition to trading in securities;

(b) the failure of the Food and Drug Administration to take timely action on cancer causing nitrofurans, or to carry out adequate monitoring of the cardiac pacemaker recall;

(c) the failure of the Federal Power Commission to keep prices of natural gas at just and reasonable levels;

(d) the failure of the Interstate Commerce Commission and the Consumer Product Safety Commission to expend the minimum effort needed to arrange priorities in important consumer protection programs;

(e) the failure of the Environmental Protection Agency to make public its list of vehicles subject to emissions recall investigations until pressed to do so by this Subcommittee; and

(f) National Highway Traffic Safety Administration's failure to issue more than one new safety standard in the 1974-1975 period.

¹ Representative Henson Moore voted present because he was not a member of the Subcommittee during portions of this investigation.

The clear need, then, is to require the agencies to take public views into account by structuring public participation directly into agency practices. The current situation, which the minority would have us continue, often permits the regulated industry viewpoint to go unanswered, a fundamentally unfair situation.

SECURITIES AND EXCHANGE COMMISSION

The minority views take issue with three conclusions reached in Chapter II on the Securities and Exchange Commission. The arguments, however, lack substance.

The minority attacks as specious the Subcommittee's assertion that the Commission failed to carry out the law with regard to the anti-competitive rules of many stock exchanges severely restricting off-board trading. The minority recognizes that the SEC was to initiate by September 1975 and complete by December 1975 a proceeding to amend off-board trading rules it found to be anticompetitive and which do not appear to be necessary or appropriate to carry out the related statutory purposes. Section 19(c) of the Securities Exchange Act of 1934 expressly provides that the Commission may abrogate, add to, or delete from the rules of an exchange and such actions are expressly included within the term "amend." The Commission concluded its proceeding in December, took no action whatsoever, and committed itself to no action in the future (other than reconsidering the matter), with respect to limitations on transactions by a dealer on his own behalf. Such failure to act is inconsistent with the plain words of Section 11A(c)(4) as added by the Securities Act Amendments of 1975.

Second, the minority disagrees that there is a need for appropriations for the Securities and Exchange Commission in the amount already authorized by the Congress. However, it is undisputed by the minority that the figures in the report are based on the Commission's own best estimates of the resources which it needs. Further, the estimates were prepared before the public revelation of illegal and questionable payments by 200 corporations, among them giants such as DuPont. Would the minority consider thorough investigation of these cases, as well as action necessary to disclose similar payments by other corporations which have not yet come forward, by the only Federal agency with both the commitment and the authority to act, an unwarranted expenditure of public funds?

Third, the minority misstates the Subcommittee's recommendations for SEC action with respect to accounting principles and auditing standards. The report does not call upon "the SEC to prescribe uniform accounting principles." The conclusions and recommendations in Chapter 2 explicitly recognize that "a framework of uniform accounting principles" may not be universally practicable, and suggests alternate safeguards in such instances. However, more uniformity than currently exists is clearly necessary. The serious problems faced by the Congress because of the lack of comparable accounting practices within the petroleum industry, led the Congress less than a year ago to direct the Securities and Exchange Commission to assure the "development and observance of accounting practices" by producers of crude oil and natural gas in order to secure a "reliable energy

data base" (Section 503(a) of the Energy Policy and Conservation Act, Public Law 94-163). The Commission should promptly exercise the authority it has and not force the Congress to go through this same legislative process for each industry.

FEDERAL TRADE COMMISSION

PETROLEUM INDUSTRY LITIGATION (EXXON CASE)

The minority disagrees with the Subcommittee's view of the *Exxon* case. Mr. Collins seems to believe that:

(1) the complaint should not have been issued when it was because a full investigation had not been conducted.

(2) the delay of the case has occurred not by the actions of the oil companies but because the FTC was not ready to prosecute the case; and

(3) the filing of this and other major antitrust cases directly in Federal district court would not speed up the process.

I believe that the minority has misunderstood the law regarding such cases, the reality in which the Commission operates and the best future role for the FTC.

First, the minority fails to understand the legal basis for the issuance of an FTC complaint. Under the Act a complaint is issued when the Commission has "reason to believe" that the Act has been violated. The extensive interrelationships between the major oil companies and the FTC's pre-complaint investigation did establish the "reason to believe" that the statute requires. Mr. Collins' reasoning would require the Commission to prove its case before it issues a complaint.

Mr. Collins cites with approval the *All State Industries* case (1968) which seemed to limit post-complaint discovery. But he fails to mention that the Commission has repudiated that doctrine in recent years. The Commission noted in the *Exxon* case itself on June 4, 1975 that:

Nor is there any merit in respondents' argument on the issue of post-complaint investigation. As we have said many times before and reiterated most recently in *Food Fair Stores, Inc.*, Docket 8935, Order of April 23, 1974, the division of the Commission's total investigative effort between the pre-complaint and post-complaint stages is entirely a housekeeping matter between the Commission and its staff, not one that can be used to challenge a post-complaint subpoena or the sufficiency of the Commission's pre-complaint investigation and hence of its "reason to believe" a violation has occurred. Post-complaint discovery by complaint counsel is entirely proper and the sole limits on its proper scope are the requirements of due process that govern in any judicial proceeding, e.g., definiteness of the demand, relevance of the data sought to the issues raised in the pleadings, etc. *United States v. Morton Salt Co.*, 338 U.S. 632, 641 (1950). Nothing in the papers before us suggest that complaint counsel in this proceeding have exceeded these bounds in their discovery efforts. (Order Denying Reconsideration at 2.) *Emphasis added.*

Owen M. Johnson, Jr., Director of the FTC's Bureau of Competition told the Subcommittee at our oversight hearings that:

As you know, we have now waived the so-called *All State* doctrine so that in theory, the complaint could be issued on less than a totally complete investigation. (FTC Hearings at 573)

Clearly, a case of this magnitude requires a great deal of post-complaint discovery, as do all antitrust cases. But Mr. Collins' reasoning would force the Commission to do all of this prior to a complaint. The

statute does not require this, nor should it. Discovery during an adjudication is a superior method because the complaint will have shaped and defined the issues.

Minority asserts, without real support, that filing the Commission's antitrust cases in Federal District Courts would not speed their pace. He ignores the Subcommittee's two major points:

(1) that the Commission, lacking contempt power, can be delayed and frustrated in a way that the Federal courts can not be; and

(2) that the resolution of pre-trial issues in one forum rather than three (the Administrative Law Judge, the Commission and then the Federal Courts of Appeal) is obviously more efficient.

Minority argues that filing cases in district court would eliminate the Commission's ability to use its "expertise" in the area. I agree that the Commission has expertise in many areas but I do not believe expertise has been gathered and brought to bear in the adjudication of cases. In fact, the Commission has virtually no experience in deciding major structural antitrust matters of this kind. Quite the opposite, it is the Federal district judges who have tried cases most similar to this one.

I believe that the best role for the Commission is to develop its expertise in selecting areas most ripe for antitrust actions and then have the option of proceeding to prosecute them in Federal court. Such a mandate would surely serve the public better than its present posture which is hampered by the ability of large economic interests to frustrate its efforts.

NATURAL GAS RESERVES INVESTIGATION

Minority disagrees with the Subcommittee's finding that the Bureau of Economics overstepped its expertise when commenting on the legal sufficiency of the evidence in the AGA case. The Bureau of Economics' memos clearly went to the amount of evidence necessary to issue a complaint. That Bureau's memo also discussed the "public policy considerations" of issuing a complaint, again a "public interest" determination to be made by the Commission.

Mr. Collins attempts to draw an analogy to the Subcommittee's calling of Dr. David Schwartz, an economist, to refute the Bureau of Economics' presentation. This is irrelevant. The Subcommittee's concern is that the Commission clearly delineate the functions of the Bureaus so that each Bureau remains within its field of expertise.

Line of Business and S. 642

Contrary to the views of the Minority, S. 642's prohibition of pre-notice of default review of FTC compulsory process would not represent a "significant change in the present state of the law." The *A. O. Smith* decision, cited by the Minority, which permitted such review of FTC process, overruled—we believe incorrectly—almost 50 years of precedents—dating back to *Federal Trade Commission v. Clair Furnace*, 274 U.S. 160 (1926)—which prohibited challenges to FTC process before the Commission has a chance to consolidate all the companies resisting that process in a single suit.

Historically, the courts denied companies the right to challenge Commission process before a notice of default issued, a notice which

signals that \$100 a day penalties would start accruing 30 days thereafter unless the noncomplying company produced the information sought within that time. The courts reasoned that a company was not in any peril until the notice issued and that, thereafter, they had ample opportunity to contest the legality of FTC process before penalties began to accrue.

Under S. 642, a noncomplying company would have ample opportunity to apply to the court for a stay of penalties before suffering any damage, a far different situation than was presented by the *Abbott Laboratories* case. The wisdom of the historic practice of prohibiting pre-notice default review has been borne out by the flood of multiple litigation on procedural questions which has tied up the Commission since the *A. O. Smith* decision. In the Line of Business cases, the *A. O. Smith* decision resulted in the noncomplying companies suing the FTC in two courts, only to have the FTC finally succeed in consolidating the cases in yet a third court 16 months later, thus substantially delaying the collection of important economic data.

Next, the minority argues that the applicable test for granting a stay of penalties is the so-called "good faith" test cited the *Genuine Parts* case. Proponents of this view, including the Chamber of Commerce and the American Bar Association, base their belief on the case of *St. Regis Paper v. United States*, 368 U.S. 208 (1961). In that case, the court actually denied a retroactive stay of penalties, but indicated in *dicta* that it could envision a situation in which a stay might be proper. "As we said in *United States v. Morton Salt Co.*, 'we are not prepared to say that courts would be powerless' to act where such orders appear suspect and ruinous penalties would be sustained pending a good faith test of their validity." The Court clarified this sentence shortly thereafter by indicating that "good faith" meant a good faith test of reasonable objections. The witness for the ABA was Mr. Irving Scher, a partner of the firm of Weil, Gotschall and Manges before the Subcommittee on Consumer Protection and Finance. In hearings on S. 642, Mr. Scher confirmed that his firm represents 12 companies resisting Line of Business orders, the Chamber of Commerce in its objections to the Corporate Patterns survey, and General Electric in its resistance to FTC process in the Commission's Electrical Equipment Manufacturers investigation.

In 1971, the Fifth Circuit Court of Appeals in the *Genuine Parts* case cited *St. Regis* in granting a stay of penalties. This is the only Court of Appeals case on stays of FTC penalties.

However, in *Ford Motor Company v. Coleman*, 402 F. Supp. 475, Cert. denied (1976), the Supreme Court found constitutional a standard for staying far more significant penalties that would require a company to show that it was likely to prevail on the merits of its claim. The Subcommittee believes that the similar provisions contained in the version of S. 642 reported by our Subcommittee on Consumer Protection and Finance are not only constitutional but strike the proper balance between the public's need for information and the companies right to timely consideration of any objections they may have to divulging that information.

Finally, the minority cites testimony in the *A. O. Smith* case that some corporations have estimated the cost of compliance with Line of Business questionnaires as up to \$1 million. The minority fails to reveal that those were estimates of interested parties on the cost of complying

with the full original Line of Business requests, which the FTC was not, in fact, requiring them to comply with. Moreover, the questionnaire has been changed substantially since that time. The FTC now estimates that the costs of compliance will at about \$24,000 a company, ranging from a low of \$10,000 to a high of \$100,000. None of the resisting companies have estimated the costs beyond those amounts.

CIVIL PENALTIES

The Minority views caution against the use of civil penalties as provided for by Section 205 of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act. The views appear to be an oversimplified or incorrect interpretation of the statute.

Congressman Collins states:

The Commission should not attempt, through Section 205, to impose on an entire industry by merely giving notice, a remedy appropriate only to the one particular company subject to the cease and desist order by alleging that failure to provide the remedy is itself a violation of the FTC Act.

This statement implies that all the FTC must do is give notice to all companies that another company has had an order entered against it and they would be liable for civil penalties should they fail to agree to the same remedies. That is simply an incorrect reading of Section 205.

Section 205 provides complete substantive and procedural due process safeguards. One may only be subject to an action for civil penalties by engaging in an "act or practice" found to be unfair or deceptive by a prior final cease and desist order. Clearly this means the same act or practice, including those which Congressman Collins refers to as "unique factual situations."

It should be noted further, that the notice requirement is perhaps the most basic due process guarantee; it by no means involves resolution of any issue. Section 205 provides that: "if the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action . . . the issues of fact in such action against such defendant shall be tried de novo."

This section provides a complete and meaningful safeguard against any procedural unfairness.

INJUNCTIONS

Minority seems to believe that the *Simeon* case did not misinterpret the Congressional intent. The Commission disagrees, however, and I think its opinion is entitled to weight.² In Chairman Collier's letter to the Subcommittee on June 9, 1976, he said:

The Ninth Circuit in *Simeon* interpreted Section 13(b) as approximating the traditional equitable standard. As such, we do not believe it is consistent with the Congressional intent, since the history expressly disavowed any such standard.

* * * * *

The equitable standard applied by the court in *Simeon* seems to impose a heavier burden and to require that the Commission persuade a court that it is likely

² Mr. Collins also cites the *FTC v. Food Town Stores, Inc.* case (Aug. 13, 1976) in which, unlike *Simeon*, an injunction was granted. He fails to mention that the Court of Appeals judge in *Food Town* did defer to the FTC's judgment as to the need for injunction, as I believe is proper. The *Food Town* case is encouraging (in the merger area, at least) but it does not remove the misinterpretation of the legislative history by the *Simeon* court.

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to succeed on the merits, rather than simply that the Commission's factual allegations and propositions of law are not insubstantial.

* * * * *
To the extent that courts develop a consistent pattern of requiring fulfillment of the traditional equity tests, Congress may well wish to consider clarifying legislation. The Commission would support such a review. We should note that *Simeon* also applied the same standard to the Commission's right to injunctive relief under Section 13(a), concerning false advertising of food and drugs. If the *Simeon* standard is adhered to under either subsection, Congressional action would be appropriate. (Reprinted in FTC Oversight Hearings, at 648-49)

ENVIRONMENTAL PROTECTION AGENCY

MOBILE SOURCE EMISSION CONTROL

Minority suggests that the Subcommittee is wrong in its determination that certification is of too limited usefulness to deserve 75 percent of the Environmental Protection Agency's mobile source emission control budget. Administrator Train concluded from his evaluation of the certification program:

[p]rototype testing cannot assure that new mass-produced vehicles will meet standards. (May 27, 1976, letter, note 32, *supra*.)

Train continued:

[c]ertification testing has been fully implemented for several years, but emission testing of in-use vehicles reveals that the *anticipated emissions reductions are not being achieved*. (*Id.*) (Emphasis added.)

Train attributed in-use failures, in part, to "lack of proper construction." The Subcommittee submits that Mr. Collins' faith in certification is not justified by the program's record.

Minority challenges the cost-effectiveness of selective enforcement auditing (SEA) and asserts that it has seen no study by the Agency on the subject. We hasten to direct Mr. Collins' attention to the Environmental Protection Agency Chapter. He will find therein a table showing in detail the results of the agency's cost-effectiveness analysis. (Note 52.)

His statements that he "does not know if EPA took into account such things as a plant shutdown," and that SEA "is not lenient," suggest that SEA may cause significant negative economic impacts. In the Agency's "worst case" estimate of SEA's economic impacts there is no possibility of a plant shutdown: "... economic burdens associated with SEA . . . will be *minimal*." (41 Fed. Reg. 31479-80, July 28, 1976.) (Emphasis added.) The 60 percent compliance requirement "approximates an averaging approach" (41 Fed. Reg. 31474) and "represents a level in emission performance which is currently being bettered by all but a few of the highest emitting engine families." (41 Fed. Reg. 31474.) If Mr. Collins has evidence that SEA will have more severe economic consequences he should come forward with it.

PESTICIDE REGULATION *

Minority states its belief that the Subcommittee report would urge the "economic, social and environmental costs and benefits of the use

* Mr. Collins suggests that the Committee on Interstate and Foreign Commerce lacks jurisdiction to evaluate the Environmental Protection Agency's efforts to reduce human exposure to hazardous pesticide products. Under the Authority of Rule X of the Rules of the House of Representatives the Committee's jurisdiction extends to issues affecting "public health" and "... health and health facilities." The threat to public health caused by unrestricted pesticide use is obvious.

of any pesticide" be ignored. We do not object to the Administrator taking into account relevant factors; on the contrary, in our chapter on the Environmental Protection Agency, we insist it comply with that section of the Act which Minority quotes. We do object to the Administrator's willingness to allow such a crude technique as risk/benefit analysis to supplant his judgment and to EPA regulations making an essentially unachievable quantification of risk and benefit a precondition to restrictions on use of dangerous pesticides.

The remainder of Mr. Collins' comments are directed to an effort to defend the conditional registration scheme.

He first urges that "[i]ts origin is squarely within 5th Amendment rights of requiring due process of law before being deprived of property." Implicit in Mr. Collins' argument is the notion that a registration is "property." An applicant for new registration obviously does not yet have that property. Nevertheless, he may be entitled to conditional registration. Does Mr. Collins suggest that by denying a registration (for which the applicant cannot qualify under FIFRA because he cannot produce test data to demonstrate that his product will not cause unreasonable adverse effects (Section 3(c)(5))) he is being deprived of a property right? If so, are all applicants for registration automatically invested with a right to a registration? Clearly they are not.

The real issue is whether Section 3(c)(5) is to have any force and effect whatsoever. Conditional registration, by granting registration even if a new registration applicant or reregistration applicant has no safety data on file, bypasses Section 3 completely. A conditionally registered party may enjoy the benefits of his registration—without even commissioning laboratory testing—until his registration expires or until cancellation or suspension proceedings conclude.

Mr. Collins' second argument brings this issue into sharp focus. "Assuming at the time the conditional registration is granted there is no data which establishes the pesticide causes unreasonable effects on the environment," Mr. Collins asks, "how then can the Administrator not register the pesticide?" This is the crux of the issue. The question should be—and according to Section 3 of FIFRA is—how can the Administrator register a pesticide with no safety data on file? He is charged by the statute to only register pesticides determined not to cause unreasonable adverse effects. How can the Administrator discharge that responsibility if he hasn't the data upon which to base his decision?

Administrator Train has promised to put chemicals to the test, not people. (See note 245 *supra* and accompanying text.) Mr. Justice William O. Douglas said "[i]f . . . there is doubt, it should be resolved in favor of humanity, lest in the end our judicial system be part and parcel of a regime that makes people, the sovereign power in this Nation, the victims of the great God Progress. . . ." (*U.S. v. Reserve Mining*, 419 U.S. 802, 804 (1974).) Mr. Collins apparently does not share this philosophy.

PART II

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Mr. Collins' views would excuse NHTSA's greatly diminished output of vehicle safety standards in the past few years, citing the increasingly complex aspects of vehicle safety performance now being addressed in agency rulemaking. The fact that NHTSA has entered into a number of challenging rulemaking areas can hardly explain the near total lack of recent standard-making activity. Agency rulemaking has stalled even in less complex and less controversial areas of rulemaking, and NHTSA has time and time again failed to meet its own schedule for completing actions on important safety standards. Examples may be found in efforts to promulgate an upgraded child restraint standard, upgraded seating strength standards, upgraded interior protection standards, and a simple standard which would require that seatbelts remain accessible in the back seats of vehicles like taxicabs. However, a more significant factor in delaying NHTSA actions has been the prevalence of political interference by the White House and the Council on Wage and Price Stability in NHTSA's attempts to exercise its statutory authority and NHTSA's inability to stand up to industry opposition to its proposals. The report's analysis of passive restraint rulemaking is intended to illustrate these factors.

Mr. Collins cites the *HD&H Tire Company v. Department of Transportation* case in support of his contention that NHTSA is required to take into account the economic effect of its standards on regulated industry. This is unquestionably true, and approximately restates the language of the House and Senate reports on the legislation creating NHTSA in 1966. The issue is a different one, namely whether beyond such a general assessment of the economic impact of a standard, NHTSA is also specifically required to perform benefit/cost analysis of its standards and that a positive (one or greater) ratio of benefits to cost be shown before rulemaking can proceed. The Minority view states that the agency, using such analysis, can compare the costs and projected benefits of alternative solutions to a problem. This would be an extremely useful exercise, if NHTSA could perform it meaningfully. However, data to support benefit/cost analysis do not exist. It is therefore highly counterproductive for the Council on Wage and Price Stability and others to continue to urge the completion of a favorable benefit/cost analysis prior to NHTSA's issuance of new rules. Enforcing such a demand would suspend NHTSA rulemaking activity pending completion of its data-gathering and analysis mechanism, now only about halfway through a five-year development cycle.

The Minority views are highly critical of the NHTSA proposal which the Minority believes would require what it terms "the so-called air bag or air cushion". This discussion fails to make it suffi-

ciently clear that NHTSA's proposed passive restraint standard would not require any particular device such as an air bag, but would leave manufacturers free to select whatever system they felt most appropriate. Presumably only those manufacturers who are highly confident of the performance of air bags would opt to meet the standard with such a system. The industry has been on notice since mid-1969 of NHTSA's intention to issue a passive restraint standard allowing manufacturers ample time to select a means of meeting the standard. The Minority in addition cites an outrageously high cost estimate for new air bags (\$350, as compared to the cost estimated by General Motors of \$220) and an even more outrageous figure for replacement cost of air bags of between \$600 and \$900. Aside from the apparent inflation of these figures beyond any reasonable measure, the Minority overlooks the fact that such bag replacements would be included within the accident cost reimbursed under most automobile property damage policies. While the premiums of such policies would, according to the American Insurance Association, increase slightly to enable insurance companies to cover such costs, these increases would be more than offset by reductions in the premiums for the medical payments portion of such policies.

The Minority seeks to make much of the following sentence in the report:

If this figure (\$2200) represents total benefits achievable by vehicle safety and cost savings countermeasures, then NHTSA has wide latitude on the cost side in issuing new standards, before the total cost of the standards begin to approach the total benefits.

These figures were intended to illustrate that the total cost of motor vehicle safety standards to date, \$250, is but a small fraction of the total cost per vehicle of human and property damages sustained in a vehicle lifetime even taking a conservative estimate of these costs. These figures do not say that the Subcommittee recommends an expenditure of \$2200 per car on safety and cost-saving countermeasures, nor were they intended to suggest that any level of expenditures would necessarily produce 100 percent effective countermeasures, as erroneously presupposed by the Minority views.

Thousands of fatalities each year can be avoided by further NHTSA rulemaking actions. The agency urgently needs to regain the momentum of the 1967-1972 period in issuing life-saving federal motor vehicle safety standards for new cars.

CONSUMER PRODUCT SAFETY COMMISSION

Although Mr. Collins agrees with the bulk of the Subcommittee's recommendations respecting the Consumer Product Safety Commission, he voices disagreement with specific recommendations. A review of his objections indicates that they are based on a misreading of the Subcommittee report or a misunderstanding of the relevant statutory and case law.

First, the Minority states that the Subcommittee report discourages the use of voluntary safety standards developed by industry associations and standards writing bodies. This is not true. The Subcommittee report recognizes that voluntary standards can be useful in some situations. The Subcommittee report also recognizes the weaknesses inherent in reliance upon voluntary standards, and it neces-

sarily cautions against the use by the Commission of any voluntary standards which have been developed without adequate consumer participation.

Second, Mr. Collins disagrees with the Subcommittee's recommendation that the Commission's imminent hazard authority be used with greater frequency and that the Commission consider promulgating rules or guidelines which specify criteria to use in determining whether a product presents an imminent hazard. The basis for the Minority's disagreement seems to be that section 12 of the Consumer Product Safety Act was designed to be used only in emergency situations and was not intended to be used as a "general regulatory tool." The Subcommittee report does not suggest that the section 12 authorities be used as a "general regulatory tool." Rather the Subcommittee report urges the Commission to use the authority when conditions exist which satisfy the statutory requirements for an imminent hazard. The Congress included section 12 in the Act to ensure that the public receive timely protection from consumer products which present imminent and unreasonable risks of death, serious illness, or severe personal injury. Failure to utilize the authority when conditions warrant is a failure to fulfill the Commission's mandate to adequately protect the public.

The Minority also indicates that it would not be appropriate for the Commission to draw up a list of targeting particular products as likely candidates for action under section 12. I agree; not only would it be inappropriate, but to draw up such a list would require a prescience of which the Commission is not capable.⁴ The Subcommittee report does not suggest that such a list be compiled. The report suggests that the Commission consider adopting rules or guidelines which spell out the criteria the Commissioners will use in determining if a product does present an imminent hazard. Such a rule or guideline would be general in nature and would put the public and industry on notice as to what the Commission will consider. It would provide greater consistency and certainty in the Commission's regulatory activities.

Third, Mr. Collins suggests that the Commission consider making funds available under section 7(d)(2) of the Act to small trade associations as well as consumer groups who wish to participate in the offer or process. In making such a suggestion, Mr. Collins seems to have lost sight of the basic policy objective of the section. The purpose of the standard setting process is to develop standards which adequately protect the consumer, hence Congress emphasized the importance of consumer participation in every stage of the development process. In explaining the funding authority, the House Committee report stated:

It is expected that the Commission will exercise its authority under this section to provide assistance to consumer organizations or groups which are less likely to be able to bear the costs of standards development than are industrial trade organizations.⁵

⁴ However, a priority list of hazardous products for purposes of initiating Commission action leading to regulation of such products is completely appropriate and was in effect recommended by the National Commission on Product Safety in 1970. Such an ordering of priorities would go far to increase the effectiveness of the Consumer Product Safety Commission.

⁵ H.R. Rep. No. 1153, 92d Cong., 2d sess. 34 (1972).

To use Commission funds to assure that all segments of industry are evenly represented would, I believe, be a highly questionable use of already limited Commission resources.

Fourth, the Minority takes issue with the Subcommittee's assertion that the Commission could base a public interest finding required by section 30(d) of the Act on the lack of expeditious rulemaking procedures in a transferred act. The speed with which the public can be afforded adequate protection from a dangerous product must be of primary concern to the Commission, and the suggestion by Mr. Collins that the Commission should use a potentially cumbersome and time-consuming procedure simply because allegedly those procedures "were specifically designed by Congress" is absurd on its face. Of course there are other considerations which the Commission should weigh in determining if it is in the public interest to act under the Consumer Product Safety Act rather than under one of the transferred acts. For example, the enforcement capabilities and the availability of notification and repurchase or recall authority may be extremely important in determining which act offers the best means of protecting the public from a particular risk. But the time involved in promulgating and implementing a regulatory action is a basic consideration and in some instances may well be the determining factor.

Finally, Mr. Collins opposes the Subcommittee's recommendation that the Commission promulgate "summary judgment" rules to avoid extended, trial-type hearings where there are no disputed issues of material fact. The Subcommittee's recommendation is well-founded in both logic and the law. It is a well-established principle of law that when no material fact question is involved or the facts are agreed, a full adversary proceeding involving presentation of evidence and cross-examination of witnesses is not obligatory, even though a pertinent statute provides for a hearing.⁶ It is also clear that a statutory opportunity for a hearing does not preclude an agency from developing regulations through the rulemaking process which bar at the threshold those who do not measure up to such regulations.⁷

The logic behind the law is that Congress does not intend governmental agencies to perform useless tasks. If a party cannot show that a hearing will serve a valid purpose, it would be a fruitless exercise and a serious waste of agency resources to require the agency to conduct the hearing. In requiring the Commission to provide an "opportunity" for a hearing, the Congress protects the due process rights of interested parties. It does not, however, relieve those parties of their responsibility to show that a hearing is warranted. To suggest that an agency must go through the motions of a formal hearing regardless of whether any need for such a hearing has been demonstrated would be dilatory and wasteful.

FOOD AND DRUG ADMINISTRATION

Mr. Collins indicates that "many of the worthwhile activities of FDA have not been given enough attention such as procedural reform and consumer activities Given this selective approach it was

⁶ *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 621-622 (1973); *United States v. Consolidated Mines & Smelting Co., Ltd.*, 455 F. 2d 432, 453 (9th Cir. 1971); *Hess & Clark, Division of Rhodia, Inc. v. Food & Drug Administration*, 495 F. 2d 975, 982 (D.C. Cir. 1974).

⁷ *Federal Power Commission v. Texaco, Inc.*, 377 U.S. 33, 39 (1964); *Weinberger v. Hynson, Westcott & Dunning, supra*.

inevitable that many of the conclusions and recommendations would be as they are."

Three points are noteworthy in that context. First, the report does acknowledge the FDA achievements, which are described as largely preventive and therefore perhaps not so well recognized by the public.

Secondly, many of those "worthwhile activities" are merely the result of FDA's belatedly conforming to Congressionally mandated reforms. However, the slowness with which FDA has been moving to comply with requirements is very unsatisfactory, compliance with the Federal Advisory Committee Act being but one example. More disturbing is the fact that all products required to be judged effective (a requirement of the 1962 amendments to the Federal Food, Drug, and Cosmetic Act) have not yet been evaluated by FDA. In 1962, FDA was required to review 3,457 drugs. As of July, 1976, final action had not been taken on 1,259.

Thirdly, the statement of Mr. Collins implies that other case studies could have been selected to show FDA as much more responsive to the public. It is difficult to ignore, however, the fact that the GAO has prepared 47 reports from 1969 to 1975 and FDA's own Division of Management Systems and Policy has conducted some 147 studies and surveys between 1966 and 1975, and many of the recommendations contained in these reports also describe the need for streamlining FDA review processes, for creating more responsiveness to consumer interests, and for other reforms.

NITROFURANS

It is inadequate to argue, as Mr. Collins does, that because FDA supports the need for legislation to revise the imminent hazard standard, a known carcinogen such as furazolidone should be allowed to accumulate a residue in consumable food. No new legislation is needed. As established by the Subcommittee's investigation all that is necessary is that FDA enforce the language of its own regulations and start protecting the public, not the drug industry.

Further, the agency's notices of opportunity for hearing—published in May of 1976 and August of 1976—can hardly be touted as an example of an effective agency response, particularly when original notices were issued in 1971 and no hearings have yet taken place under either the original or the revised notices.

The complexity of the scientific issues that still need to be resolved and the manufacturer's claim that furazolidone is not a carcinogen with respect to humans are not significant. The Delaney Clause of the Food, Drug, and Cosmetic Act (21 U.S.C. 360b(d)(1)(H)) states that a drug shall be deemed unsafe if "such drug induces cancer when ingested by man or animal . . ." unless—

(i) such drug will not adversely affect the animals for which it is intended, and

(ii) no residue of such drug will be found (by methods of examination prescribed or approved by the Secretary by regulations . . .) in any edible portion of such animals after slaughter or in any food yielded by or derived from the living animals.

In conformity with the statute, (1) the agency does not need to prove that nitrofurans are human carcinogens: it is already accepted

that furazolidone is carcinogenic to animals; and (2) the manufacturer must, and has yet to, provide the Secretary with a reliable method for detecting the drugs at low levels. Further, residues of the nitrofurans have been found in poultry and swine tissue, milk, and eggs, contrary to clause (ii) above.

The February 1976 inflation impact statement prepared by FDA itself with regard to this matter indicates that while removal of nitrofurans will have an effect on the economy, it should not be a determinant in the decision because the drugs should be removed from the market under the presently known facts and the applicable statute and regulations. The statement also notes the availability of alternative drugs which are not known animal carcinogens.

Lastly, Mr. Collins raises the determination of the "probability" of serious harm before the "imminent hazard" standard for suspension may be invoked. He mistakenly suggests that the report advocates an "automatic" finding of imminent hazard related only to the time necessary to resolve scientific questions. That is not the case; the report merely urges that FDA apply its own regulations which provide: ". . . imminent hazard may be declared at any point in the chain of events *which may ultimately result in harm to the public health.*" [Emphasis added] (45 CFR 3.73(a)). It is reasonable to conclude that a known animal carcinogen which cannot satisfy the criteria of the Delaney clause is one which "may ultimately result in harm to the public health" during the year or two required in any realistic projection of the administrative process.

CONFLICT OF INTEREST

Examining the conflict of interest section, Mr. Collins remarks state that ". . . it is the Subcommittee's own report and selective attention to these subjects that has the potential for adversely affecting the agency's image." Would the Minority prefer that the Subcommittee ignore the fact that there are violations of the conflict of interest laws and regulations so that the agency's image can remain untarnished? Commissioner Schmidt himself stated at our hearings that the agency was "lax" and "deficient." When the General Accounting Office examined the situation, Commissioner Schmidt testified that GAO "caught us with our pants down."

Mr. Collins states that there were no actual conflicts of interest identified by GAO or the Subcommittee. This is a misleading statement. There were several instances in which regulatory employees held prohibited interests in companies coming directly within the scope of their duties. What the Subcommittee did not find were instances when these conflicts had necessarily influenced regulatory decisions. This in no way lessens the danger or the fact that ownership of interests in companies under these circumstances is itself the violation of conflict of interest rules.

PACEMAKERS

Mr. Collins suggests that the pacemaker problem has gone away now that FDA has been given stronger authority in the statutes to regulate such devices. The fact that such medical devices legislation was necessary was not disputed during the hearings. The enactment

of the Medical Devices Amendments (P.L. 94-295) subsequent to our hearings speaks eloquently to that point.

The issue of pacemakers, however, remains and draws into question the ability and competence of the Food and Drug Administration to carry out delegated enforcement powers. If FDA demonstrates difficulty and mismanagement in implementing a weaker statute, what faith can one have that a more stringent law will be effectively executed?

GAO found that the agency failed to contact all product consignees, that the pacemaker recall never appeared in the agency's recall list, that the agency did not issue a public warning, and that certain enforcement actions never considered in timely fashion because the General Counsel's Office was never brought into the cases in time.

FDA failed to inspect completely the manufacturing facilities to ascertain the causes of the first recall and subsequently accepted without question the company's assurances that the defect had been corrected. Can we be confident that the situation will be any better under a more stringent statute?

ADVISORY COMMITTEES

There is no doubt, as the Minority views point out, that FDA operates one of the most active advisory committee systems in the government. However, the issue of concern to the Subcommittee was the manner in which these advisory committees operate, and particularly, whether the agency conforms to the Federal Advisory Committee Act.

We are heartened to note that FDA has recently announced that its advisory committees will now hold deliberative sessions in the open. However, there remains the concern, raised by the Subcommittee in hearings, that the agency will continue to seek closure of portions of the meetings on inappropriate grounds; for example, asking that portions of a meeting be closed to discuss matters involving trade secrets when no real trade secret materials was discussed. The Subcommittee believes it essential that the agency not abuse the definitions of trade secrets and internal memoranda and that full transcripts be kept and made available as required by the law.

REORGANIZATION

Mr. Collin's arguments against creating a unified consumer safety and health agency appear to be based upon a recent GAO report disclosing administrative problems within the Consumer Product Safety Commission (CPSC). It is faulty logic, however, to argue that because the FDA is not effective and that the Consumer Product Safety Commission, as constituted, is not fully effective Congress should not consider legislation that would create a consolidated independent regulatory agency. The basis of this recommendation is that there are independent multi-member commissions that are effective, particularly as pointed out in this report, the Federal Trade Commission (FTC) and Securities Exchange Commission (SEC). The aim of the Subcommittee recommendation is to raise the standards of the CPSC

and the FDA by strengthening them and rationalizing the jurisdiction of both agencies (as well as the regulatory functions of NHTSA).

The logic of Mr. Collins, in addition, does not take into consideration the relatively small role that regulatory functions of FDA play within the massive responsibilities of the Department of Health, Education, and Welfare. There is no doubt that as currently established FDA cannot receive the attention from the Department that it deserves. FDA must always act through the Assistant Secretary for Health, the Under Secretary, and then the Secretary and in this way must compete with other policy considerations and priorities.

PART III

FEDERAL POWER COMMISSION

My reaction to the dissenting views of the Gentlemen from Texas is not one of surprise. Mr. Collins and Mr. Krueger would have us believe that Exxon, Shell, Texaco, Gulf, and the other major petroleum companies that dominate the oil and gas industry in this country, and indeed throughout the world, are frustrated in their desire to supply the American people with natural gas at equitable prices by the unrealistically low prices that have resulted from Federal regulation of natural gas prices. The Seven Sisters and their boosters insist that the industry is engaged in an all out effort to find and to produce natural gas in blissful ignorance of the spectacular profits that await them should the Congress (or the Federal Power Commission through *de facto* deregulation) accede to their demands for deregulation as a condition for supplying the American people with natural gas. The fact, however, is that the Administration and the Federal Power Commission, the former by its intense efforts on behalf of deregulation, and the latter through a pricing policy that has increased the price of natural gas 186 percent in the past 18 months, have created a situation that provides producers with a clear economic incentive to withhold natural gas from the interstate market. To suggest that the industry is producing with all deliberate speed under these circumstances is to confuse the natural gas industry with an eleemosynary enterprise, to ignore the record of this Subcommittee, and of its sister Energy and Power Subcommittee, and to forget that the House last February voted to extend rather than to eliminate Federal regulation of natural gas prices after full and vigorous debate.

Those who are impressed with the Administration/industry claims that unregulated prices will result in significantly more gas, a contention that is totally at odds with the Administration's own Project Independence Report, and a report by the Texas Governor's Energy Council, are persons of short memory indeed.⁸ In 1971, for example, the FPC more than doubled the price for new natural gas from the key South Louisiana area in setting a price of 26 cents per Mcf. The Commission agreed to this unprecedented price increase on the basis of a pledge from the producers that:

The ceiling prices and other provisions contained herein will make funds available to the producing industry and create a regulatory atmosphere which should provide an incentive for a substantial increase in exploratory and developmental activities and make a major contribution to bringing forth additional

⁸ Federal Energy Administration, Project Independence Report, p. 93 (November 1974). Russell G. Thompson, Relationship Between Supply/Demand and Pricing for Alternative Fuels in Texas: A Study in Elasticities, p. 31 (Jan. 1, 1975). See also Professor Thompson's testimony before the Subcommittee on Sept. 10, 1976.

supplies of gas from the Southern Louisiana Area to meet the demands of all consumers supplied by this area.⁹

Virtually every major rate decision handed down by the Commission over the past eleven years, a period in which the price of new natural gas has increased over 760 percent from 16.5¢ to \$1.42 per Mcf, has been accomplished by a statement from the Commission to the effect that its latest price increase would provide the producers with the incentive needed to produce new supplies of natural gas.

The Subcommittee report demonstrates the natural gas industry already had adequate incentive to produce at a price of 50¢/Mcf or less. The Federal Power Commission affords natural gas producers a price based on a return on common equity of approximately 17 percent (Opinion No. 770, RM75-14, page 78). This substantial rate of return is higher than that realized by U.S. petroleum companies on their worldwide consolidated operations and most other industries. It is much higher than almost any return available to an individual investor or consumer on comparable risks. If the natural gas industry believes that 17 percent on its investment is insufficient, it has only to produce its tax returns for the examination of the public and the Federal Power Commission and attempt to justify a higher rate.¹⁰ The production of such actual cost data is something the industry has repeatedly fought. It seeks instead an extraordinary price windfall without the necessity of substantiating its need or committing itself to the production of any specified level of domestic natural gas supplies.

There are, in fact, three economic reasons why higher natural gas prices will not result in significant additional quantities of gas. First, selling the same or lower amounts at substantially higher per unit prices will cause higher profits without increased production. In terms of realizing greater profits, there will be no incentive to increase production. Second, the less producers sell today, the greater upward pressure is maintained on price, given the existing relationship between supply and demand in influencing even regulated prices. Third, profits are also maximized because the less gas producers sell today, the larger the amount they will have to sell in the future at higher prices.

What we have then is a situation in which consumers have been required to pay, and pay, and pay while the producers have not been required to produce. The *laissez-faire* policy of the Administration and the Gentlemen from Texas which ratifies this situation offers a retreat rather than a solution to our Nation's critical energy problems.

LACK OF RELIABLE INFORMATION FOR REGULATION

Rather than acknowledging the massive infirmities in AGA reserve data that have been revealed by this Subcommittee and by the FPC 31 lease staff study which formed the basis of Commissioner Smith's dissent in Opinion 770, the Dissenters seek to impugn the competence

⁹ Area Rate Proceeding *et al.* (Southern Louisiana Area). Docket Nos. AR61-2 *et al.* AR69-1. Issued July 16, 1971. Opinion 598, Appendix A, p. 27.

¹⁰ "Analysis of Tax Data of Seven Major Oil Companies," Committee on Government Operations, United States Senate, November 1974. The study found that seven major oil companies paid an effective U.S. income tax rate of 5.36 percent in only one case, and appreciably less than 5 percent in all other cases, from 1968 through 1972, see note 81 of FPC chapter. See also "Study of Corporate Taxes" as reported in public records of Securities and Exchange Commission, by Representative Charles Vanik, October 1976.

of the Subcommittee staff.¹¹ Mr. Collins and Mr. Krueger are free, and have always been free, to examine the AGA/U.S. Geological Survey reserve data that form the basis for the staff comparison of AGA and USGS reserve estimates which established a 37.4 percent understatement by AGA.

Mr. Collins and Mr. Krueger further criticize the staff for not having completed its review of the over 750,000 reserve-related documents that the Subcommittee subpoenaed in June 1975 from seven natural gas producers and the AGA. The staff has been handicapped in its investigation due to the vastly dissimilar recordkeeping systems employed by the producers and the AGA, and by the AGA's faulty and incomplete records. The Subcommittee will issue a comprehensive report on this subject as soon as possible.

"ABANDONMENT OF COST BASED PRICING"

I am not surprised that two of my colleagues, who in their dissent embrace deregulation of natural gas as the "ultimate answer", defend the Federal Power Commission's Opinion No. 770. This decision amounts to a *de facto* deregulation of natural gas pricing, contrary to a decision of the 94th Congress not only to maintain, but to extend regulation.

"The demand of the report," say the dissenters, referring to our criticism that the Commission relied upon hypothetical rather than actual costs, "is impossible." It is not the Subcommittee's "demand", of course, but that of the Congress and the Natural Gas Act that requires the Commission to look to something other than theoretical maximum tax rates, to cite just one example. Surely it is not too much to ask of the gas producers who stand to benefit so mightily from any rate increase, to come forward with evidence which can be tested by the public which must pay the higher rates they seek. And on this largest of all components of the new rate, the FPC required nothing of the producers, not a tax return from the past, nor even a statement under oath of projections for the future.

But the minority dismisses the relevance of tax returns. Repeal of the depletion allowance, they say, is a recent development. True, but others have not found it impossible to assess the effect of repeal. The Minority conveniently ignores evidence in the Subcommittee's record—a Library of Congress study, and statements of the FPC's own staff—that the effect of repeal is much less than that assumed by the Commission.

More important, my dissenting colleagues unwittingly argue against themselves, when they say, correctly, that "tax returns do not isolate jurisdictional gas sales. . ." Just so. And that is precisely what the Supreme Court relied upon so heavily in *FPC v. United Gas Pipeline Co.* when it spoke of the FPC's power and duty to reduce rates, "based on the application of nonjurisdictional losses to jurisdictional income."

¹¹ While the Minority is correct in noting that the FPC staff found in the 31 lease investigation that AGA estimates were reasonable over long periods of time, it also found that 1971-72 discoveries and reserves at year end 1974 are not accurately stated in the AGA publication for that two-year period. The Commission staff concluded that there is a significant reporting lag between the actual field discovery and the inclusion of the field reserves in the AGA annual report. Therefore, the practice of using AGA data for calculating productivity (for rate-making purposes) remains a questionable practice and in fact, the Commission staff recommended, "Some form of trending or averaging of the reserves discovery over several years is preferable to relying on year-to-year productivity calculations."

It is with truly remarkable lack of logic that the minority somehow interprets the case to mean the opposite of what it plainly says. The FPC should have considered true costs, which can only mean an assessment of the taxes gas producers actually pay. To that consideration, nonjurisdictional tax write-offs are essential.

The dissent need not have pointed out that the statutory corporate income tax amounts to 48 percent of income after the first \$25,000. We know that. What we do not know now, but want very much to know, is just how the minority's hypothetical ABC Oil Co. manages so effortlessly to deduct \$870,000 from its gross income of a million, leaving only \$105,000 to tax. That 87 percent is of course the real variable to which the FPC should have looked when it set the new rate. For there is an abundance of evidence that oil and gas companies, through a variety of deductions not available to other industries, actually pay much less than the statutory maximum.¹²

That the Subcommittee staff attributed to the tax component 43¢ of the new \$1.42 rate, instead of the ultimate level price of \$1.61, is *de minimus*. It means that the tax break accounts for 26.7 percent of the new rate, instead of 30.28 percent—still far beyond the 16 percent recommended by the Commission's own staff.

The minority invites our attention to page 89 of Opinion No. 770 to prove that tax benefits, as well as liabilities, were properly taken into account by the Commission. It is perfectly true that some were: and we have never said otherwise. But my dissenting colleagues apparently overlooked page 85, where the Commission runs away from the really significant write-offs associated with new exploration and expansion, ostensibly because they are difficult to calculate. So too are tax liabilities difficult to calculate, but in that case the Commission was very brave indeed.

The minority decries our questioning of Joint Association Survey, industry supplied drilling cost data, chiefly on grounds that there is no place to obtain such data other than from industry. We agree. But is an independent audit not an essential verification? As the Subcommittee report points out, the FPC's Chief Economist thought so. The point is, as with the tax component, a rational FPC decision must rely on empirical evidence. In that respect, I quite agree with the minority's statement that "the cost based rate must use available cost data and adjust for trends indicated by the data."

It is perhaps not without significance that the dissenting views entirely omit reference to several other important deficiencies in Opinion No. 770—chief among them the Commission's failure to consider the benefits of advanced payments, and the Commission's baffling and inconsistent definition of "new gas" to which the new high rate applies. I hope that the dissent's silence does not constitute approval of this abuse of the consuming public.

THE FPC'S FAILURE TO ENFORCE DELIVERY OBLIGATIONS OF NATURAL GAS PRODUCERS

The dissent asks the reader to believe that natural gas producers have no firm delivery obligations whatsoever—even for gas on public lands. The dissent claims that the gas supply contracts between pro-

¹² See note 3 *supra*.

ducers and pipelines only place obligations on the pipelines to take gas. The producers, it is contended, do not guarantee any "certain performance standard." This contention is quite simply, contrary to the provisions of the Natural Gas Act. The Natural Gas Act places performance standards on natural gas producers.

To support its position the dissent refers to what it calls "the standard gas sales contract." However, the dissent's reference to private contracts is misplaced. Gas sales contracts operate subject to the requirements of the Natural Gas Act. In addition, a standard industry-wide sales contract does not exist.¹³ Gas sales contracts vary in their terms. It is precisely because contracts differ that the Commission determined that without Form 108 to determine delivery requirements it would have to complete a full review of each and every rate schedule on file at the Commission.¹⁴

It is the statutory standards of the Natural Gas Act and the certificates issued by the Commission thereunder that control gas producers' delivery obligations. The Commission's certificates of public convenience and necessity define producer's delivery obligations. Order No. 539 provides that the "certificated minimum daily obligations" of producers (1) shall be determined in accordance with applicable provisions specifically set forth in the producer sellers contract unless otherwise changed by the certificate authorization, (2) shall be without regard to any contractual reservations contrary to the certificate authorization, and (3) shall remain in full force and effect

¹³ The dissent's reference to a "standard gas sales contract" is unsupported by an evidentiary showing at a hearing or otherwise. The two contracts, produced by the minority only after the opportunity to evaluate them in a hearing with expert witnesses had passed, do not identify the Seller and the Buyer and, as presented, are not susceptible of authentication. Accordingly, the submission of these purported gas sales contracts as appendices I and II of the report are of marginal value and establish little about their use or proper interpretation.

¹⁴ While private contracts are not determinative of natural gas producers' delivery obligations under the Natural Gas Act, the two contracts selected by the dissent actually contradict the assertion that there are no delivery obligations upon producers. Both alleged agreements establish that such contracts, if actually used, would impose delivery obligations on producers.

Section 3 of Appendix I clearly states: "Seller agrees to sell and deliver to Buyer" a specific quantity of natural gas called the "Sellers delivery capacity." Section 3(a) provides that the producer seller will deliver 90 percent of its delivery capacity for 5 years following the date of first delivery. Section 3(b) provides that the producer seller will deliver .85 percent of its delivery capacity after the first five years of delivery. Section 3(c) provides that "Seller will sell and deliver to buyer" additional quantities of gas. Section 3(d) provides that daily deliveries may vary by 10 percent but monthly total deliveries may vary by only 5 percent. Section 3(e) provides that the producer sellers delivery capacity shall be determined by certain specified tests. Section 3(f) provides that such tests may be requested by either buyer or seller but will not be conducted more often than every three months. Section 3(g) provides that between any two tests delivery capacity is determined by the first test and that in this limited circumstance, i.e. between two tests, the sellers delivery capacity shall be the gas actually delivered. No fair reading of this agreement can, we submit, reach the conclusion that only one party (Seller) has any delivery rights. Such an interpretation is, particularly in view of the plain language referring to seller's agreement "to sell and deliver," ludicrous. Furthermore, a (one-sided) contract of adhesion is not lightly inferred nor favored by the courts or the Uniform Commercial Code.

Article IV, Section 1 of Appendix II provides that "Seller agrees to sell and deliver to Buyer" an "average daily quantity of gas" equal to one million cubic feet for each seven billion three hundred million cubic feet of reserves in the ground. This same section specifically makes reference to "the obligations of Seller to deliver" gas. If the producer seller is unable to maintain its obligation to deliver its "average daily quantity of gas," Section 3 provides that its delivery obligation is reduced to 80 percent of the deliverability it is able to develop and maintain.

Article II, Section 2 provides that the obligations of the seller include the production of gas "in accordance with prudent oil and gas field practice." Article IV, Section 1 provides that the Seller will proceed with reasonable diligence to construct the facilities required to deliver gas in accordance with the terms of the agreement. Thus, under the contracts submitted by the dissent each producer has a definite or calculable volume of gas it is obligated to deliver each day. This is further established by the incorporation of a *force majeure* clause in each contract. If, as the dissent contends, producers had no delivery obligations, the *force majeure* clause in each contract, permitting deviations from delivery obligations for acts of God, would be totally superfluous and unnecessary.

unless and until changed by appropriate certificate authorization amendment based upon the producers full documentation of the reasons for any proposed certificate amendment. Contractual relations between producers and pipelines operate in conjunction with and subject to the Commission's regulatory powers.

Section 7(e) of the Natural Gas Act provides that a certificate authorizing service shall be issued upon a finding that the seller is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act and the proposed service is or will be required by the present or future public convenience and necessity. The specific quantity of gas to be delivered by a producer is part of the certificated service.

Section 7(b) of the Natural Gas Act states that no natural gas company shall cease or abandon *any* service without the prior permission and approval by the Commission. A reduction in the quantity of gas delivered by a producer is a reduction of "any service" and constitutes a partial abandonment of service requiring prior Commission approval. *Panhandle Eastern Pipeline Co. v. Michigan Consolidated Gas Co.*, 177 F.2d 942, 945 (6th Cir. 1949). A one-sided producer contract may only require that the producer deliver whatever he decides to deliver but the Natural Gas Act was designed to protect consumers from such arbitrary and capricious acts. The public convenience and necessity does not allow for unilateral acts by natural gas producers to thwart the public's need for a reliable supply of natural gas.

The dissent does not dispute that once a producer commences service to a pipeline by delivering gas it may not cease or abandon all or any portion of that service without Commission authorization. The dissent does not dispute that producers are required under the Natural Gas Act to secure Commission approval through the amendment of their certificates when they wish to abandon a portion of their service by reducing their deliveries. Until producers obtain Commission approval for their reduced deliveries, the producers delivery obligations, as established in their Commission certificates, remain unchanged. To obtain Commission approval for the delivery of reduced volumes the producers are required to explain fully the reasons for their claimed inability to deliver.

There is a distinct and distressing lack of enthusiasm by producers to be accountable to anyone for their actions. If producers had nothing to hide, one would suppose that they would not object to providing public explanations for the failure of their wells to deliver natural gas as required by their certificates and the Act.

CITIES SERVICE—SOUTH BRAZOS BLOCK A-76

My colleagues from Texas fail in their argument because they consistently refuse to recognize the facts established, under oath, in this case.

During 1974, only five companies operating in the Gulf of Mexico had rigs capable of handling the workover that A-76 required. Contrary to the testimony of Cities Service official Oliver that Cities made a "total commitment of manpower" to obtain a rig, only one Cities' employee was assigned this task. He contacted only two of the five companies in mid-April, none in May and June, and did not

contact Walker-Huthnance, which ultimately performed the workover, until mid-July.

Had Cities diligently contacted these companies in April, it would have learned of the availability by June 1st of Dresser Offshore's Rig 51. As it was, Cities only learned of Rig 51's availability because Dresser's Paul Vernon initiated contact with Cities in June. Vernon surveyed platform A-76 on June 25 and concluded that Rig 51 would be completely satisfactory to perform the workover. He so advised Cities on that date, and thereafter prepared a written proposal which Cities rejected.

Oliver testified that use of Rig 51 would have necessitated removal of production equipment which would cause the platform to be shut down "in excess of a month." Vernon and two other experts advised that the equipment could be removed in 3-5 days. Later, Brown and Root, the engineering firm that fabricated the equipment, estimated that it would have taken 25 days to prepare the platform for Rig 51. The dissent notes that the two experts who agreed with Vernon did not visit the platform, but used photographs of the structure to reach their conclusions. This in no way deters from the fact that Vernon did visit and survey the platform. The two experts independently concurred with his views. The Subcommittee relies on the expertise of Vernon, whose business is surveying platforms to determine whether his company's rigs are suitable for workovers. Neither Oliver nor Brown and Root are in the business of performing workovers.

With regard to replacement tubing, the dissent ignore the pertinent facts disclosed at the Subcommittee's hearing, all of which were documented. Evidence and testimony revealed that Cities had acquired adequate tubing by June 1974, to conduct the workover in accordance with the plan it had developed at that time, utilizing a combination of new and used $3\frac{1}{2}$ " and new $2\frac{7}{8}$ " tubing. By April 30, Cities had acquired 18,600' of $3\frac{1}{2}$ " tubing, but learned it would have difficulty finding additional quantities because of the short supply of this size. Cities then purchased 30,000' of $2\frac{7}{8}$ " tubing on May 30, specifically for the A-76 wells. Strangely, none of this 30,000', purchased at a non-inflated price, was ever used in the workover, nor was it mentioned by Oliver in his testimony before the FPC.

The minority cites Transco's letter of April 19, 1974, advising Cities Service that it had no slack demand periods and needed all of the gas it could get whenever it could get it. The minority states: "Cities Service relied on this letter in making their workover planning decisions."

This is a misstatement of the facts. There is absolutely no evidence on the record, either in testimony by Cities' officials or contained in Cities' internal memoranda, indicating that Cities Service relied on Transco's letter in making their workover plans. To the contrary, while Cities' officials testified that it is more desirable to conduct a workover in the summer because the good weather will result in less delay, the workover was actually conducted in the peak demand winter months.

Transco had experienced curtailments during the winter of 1973-74 and anticipated further shortages for the 1974-75 winter. The point of the Transco letter was simply that the pipeline needed gas whenever it could get it, due to their curtailed situation. At no time did Transco suggest to Cities that the workover should be delayed until the winter.

Transco officials testified that in the 18 years that the pipeline had been purchasing gas from offshore fields, it had never experienced a

situation similar to A-76 where an entire field was shut down for such an extended period of time. The total loss of gas to Transco from August 1974 to January 20, 1975, was 13 billion cubic feet. Transco reiterated its position in a letter dated May 1, 1975, to Cities Service, stating in part:

It is important that we maintain maximum volumes at all times, and is particularly critical during the winter period from November 15 to April 15. In this regard, we sincerely request your cooperation in scheduling any work which reduces deliveries to Transco so that any reduction will be minimized. Also, insofar as possible, we request that such work be completed prior to November 15, 1975, in order that maximum volumes may be available during the winter period. (emphasis added.)

The dissent notes that the Subcommittee staff report indicated that shut-downs such as A-76 had "the effect of intensifying pressure on Congress for deregulation", but dismisses this statement by concluding there is no evidence that Cities delayed performing the workover for this purpose. The statement was that shut-downs had "the effect" of increasing pressure for deregulation, which is precisely what occurred.

The dissent disputes the staff report statement that "the only way Cities Service could substantially improve the price of this gas would be through decontrol" claiming that the A-76 gas would have been unaffected by Federal decontrol. The contention, of course, would depend on the specific language contained in any successful decontrol legislation—which Cities could not have anticipated at the time. It is clear, however, that a motive to delay production existed. If legislation had been enacted, for example, decontrolling gas coming on line prior to June 1972, when A-76 went into production, then Cities could have obtained higher prices for this gas, its 20-year contract with Transco notwithstanding. As one Transco official advised the Subcommittee, any producer/pipeline contract, not otherwise subject to regulation, is subject to renegotiation, especially if the pipeline hopes to acquire future gas supplies from the producer.

BASTIAN BAY—TENNECO/GETTY

Although the Bastian Bay Field is claimed to be about 73 percent depleted, it is still one of the largest fields ever discovered and at the time of the Subcommittee's investigation was the 14th largest field in the country on the basis of remaining reserves. In actual numbers, Getty estimated the remaining reserves to be approximately 600 billion cubic feet.¹⁵

The minority views in addition to understanding the above point also claim that Tenneco believed that additional drilling would damage the field. However, it is obvious from the Subcommittee's record that the same Mr. Freeman (of Tenneco), in the following discussion, had no first hand experience with this problem and had obtained no details from responsible Tenneco personnel:¹⁶

Mr. ROSENBERG [Subcommittee Counsel]. Mr. Freeman, who has told you that drilling new wells is risky in this particular field?

Mr. FREEMAN [Tenneco Oil Company]. Who has told me that?

Mr. ROSENBERG. Yes. Who has indicated that to you in the company?

Mr. FREEMAN. I don't actually get engaged in drilling wells. I am aware of the problem.

¹⁵ Supra, Bastian Bay Field, p. 46.

¹⁶ Id., p. 47.

Mr. ROSENBERG. So this is your personal opinion, you have not studied the data in this particular field?

Mr. FREEMAN. I am aware of the pressures in both the gas sands and the water sands and I know what the differential problems are.

Mr. ROSENBERG. Did you discuss this with anyone in Tenneco or Tennessee Gas?

Mr. FREEMAN. No, not in any detail. I think I have talked to Mr. Singer on occasion.

In the specific case of the "V" reservoir, the Minority report cites Tenneco's opinion that additional drilling here may be counterproductive. However, it is interesting to note that Tenneco never discussed this with Getty in any of their joint meetings¹⁷ and moreover, an internal Tenneco study reported that drilling into the "V" reservoir would be feasible if a "new gas" price could be obtained.¹⁸ Hence, the primary reasons for not drilling this and other reservoirs were not engineering fears of damaging the field but economics in that the delay in developing the field would be likely to result in higher prices.

EXXON/QUINTANA-GARDEN CITY FIELD

The minority views maintain that the Subcommittee did not consider economics in determining whether the Garden City Field was capable of increased production. This is simply not the case. Specifically, the report cites several reservoirs that were too small to warrant development, and others that were large enough to warrant the drilling of a new well or recompletion of a well.¹⁹ In all of these cases, the economics were explicitly discussed including cost (based on Quintana's own records), the expected revenue, and payback period.

In one instance, a recompletion project promised an undiscounted profit-to-investment ratio of between 3:1 and almost 6:1. Quintana's own economic feasibility criterion calls for a return of 3-4:1, but the company failed to undertake this project and in an internal memo (cited in the report) provided the following rationale for this decision: "Since the reserves are uncommitted and the price free to rise, it is recommended that the project be deferred indefinitely until a higher gas price better justifies the risk involved."²⁰

The report further discusses the various constraints that have impeded development of this field including state conservation regulations and economics. The real issue is that Quintana has not been willing to undertake projects designed to increase interstate deliveries but has given higher priority to intrastate gas projects even though the former are very profitable. The following exchange succinctly illustrates the point:²¹

Mr. STAM (Subcommittee Counsel). In the context of considering whether to drill a well or rework a well, has there been discussion of the fact that it is more profitable to produce natural gas for intrastate sales as opposed to interstate sales?

Mr. FRICK (Quintana Petroleum). Yes. I think it is fairly obvious that . . . it is much more profitable right now . . . to drill a well to produce . . . gas to be sold into the intrastate market.

Mr. STAM. But it is also possible to make money by producing gas for the interstate market, isn't that true?

Mr. FRICK. That is true.

¹⁷ *Id.*, p. 48.

¹⁸ *Id.*, p. 49.

¹⁹ *Supra*, Garden City Field, pp. 11-12.

²⁰ *Id.*, p. 12.

²¹ *Id.*, p. 16.

Mr. STAM. It is a question of priorities then?

Mr. FAULK. I would say yes, that would be right.

Perhaps a company cannot be blamed for placing its profits above the public's need for jobs and heating in winter, but the public and the Congress, are entitled to consider these facts in writing new anti-trust and natural gas legislation.

MOBIL-GRAND ISLE 95

Congressmen Collins and Krueger take strong issue with the Subcommittee's conclusions that Mobil's actions in refusing to accept *any* certificate (even a temporary certificate) from the FPC to sell gas from Grand Isle 95 constituted intentional withholding of gas supplies from the interstate market.

It is, of course, because Mobile *did* diligently explore and develop the Grand Isle 95 Field that it is so difficult to understand why Mobil was so obstinate in refusing to accept FPC certification in 1975. There was absolutely no justification for Mobil's attempt to obtain such certification based on a 10-year contract term with Trunkline, given the substantial quantity of reserves involved. The public is entitled to an assured supply and price for at least 20 years, especially for gas on public lands. Neither was there justification, on the part of both Mobil and the FPC, for the loss of production from this field during the 1975-76 winter heating season.

It is interesting to note the events which have transpired since Mobil failed to bring this gas on line last year. By letter dated September 22, 1976, to Chairman Moss, Mobil's Manager of Natural Gas, Mr. J. E. Earnest, reiterated Mobil's position concerning Grand Isle 95 as stated in his testimony before the Subcommittee last January. He stated, in part: "It is obviously to our benefit to generate revenue as quickly as possible." The Subcommittee concludes that in the case of Grand Isle 95, nothing could be less obvious. The economics of the situation simply do not support Mr. Earnest's statement.

Had Mobil commenced production from Platform A in November 1975, as it could have, the gas would have sold for about 53¢ per Mcf. Daily production of 60 MMcf (Mobil's lower estimate) over the 8-month period from November 1975 to July 27, 1976, when the FPC issued Opinion 770 increasing the rate, would have produced total revenues of approximately \$7.6 million. By its failure to bring this gas on line last year, Mobil now stands to realize a substantial profit.

As a result of Opinion 770, Mobil, in late August 1976, filed with the FPC for a rate increase from 53¢ to \$1.45 per Mcf. If Mobil's rate increase is approved, retroactive to September 2, 1976, when the gas came on line, production from Platform A over the next eight months will generate revenues of some \$20.8 million, compared with the \$7.6 million for the same volume of gas if production had started in November 1975. Quite obviously, it was *not* to Mobil's benefit "to generate revenue as quickly as possible" in this instance. And Mobil's share of this additional revenue will more than offset the interest payments on the \$23 million Mobil has invested in lease bonuses in this field to date.

Further, it is both pertinent and interesting to note that in May 1976, Mobil amended its contract with Trunkline to extend the term from 10 to 15 years—the principal issue that Mobil was unwilling to consider a year earlier. Again the motive for withholding gas and the actual result of Mobil's delay are obvious.

LACK OF CONSUMER INTEREST REPRESENTATION

The dissent would have us believe that participation by some public interest groups in a single case out of the hundreds of cases at the Commission is indicative of adequate consumer representation before the Commission. Present and former Commission employees confirm that a predominant number of cases at the Commission are conducted without the benefit of any consumer interest representation other than that provided by the Commission's staff. Commission Chairman Richard L. Dunham testified that there was "a dearth of actual direct consumer involvement" in some of the Commission's most important cases.²²

Numerous state and consumer interest representatives testified before the Subcommittee that they were unable to effectively participate in Commission cases because of the expense involved and the Commission's lack of interest in encouraging consumer interest participation. Mark Caplan, the Executive Director of the Connecticut Citizen Action Group testified that "[t]he record shows that citizen and public interest groups appearances before the FPC have been rare. * * * It seems to us that the FPC itself has not been very interested in getting consumer groups there."²³ Stanley Van Ness, the New Jersey State Public Advocate testified that Federal Power Commission "[r]egulations which pay lip service to the right of citizen and public interest intervention are meaningless unless coupled with the provision of adequate financial assistance to make the right of standing more than an illusion.

The experience of the Department of the Public Advocate we feel demonstrates the necessity for public interest intervention and the concomitant need for funding in this area."²⁴ Julius Michaelson, the Attorney General for the State of Rhode Island testified that "[t]he consumer who pays the bill is usually unrepresented or inadequately represented" in Commission proceedings.

Thus, the limited consumer participation cited by Mr. Collins and Mr. Krueger is refuted by substantial testimony to the contrary including that from the agency itself.

The limited consumer participation cited by the dissent in the Commission's biennial rate review was undercut, by the Commission's decision to base its decision on a rulemaking procedure, as opposed to an evidentiary hearing which would have enabled the few consumer representatives to subject to cross examination the producer representations concerning cost, reserves, and income tax.

The Commission's regulation of gas and electric rates has a substantial economic impact on consumers. The Commission's latest gas producer biennial rate case conservatively estimates the annual economic impact on consumers at \$1.5 billion. Electric rate cases and pipeline gas rate case add further substantial economic burdens on consumers. The continuing upward spiral of electricity and natural gas prices is a vital concern to consumers and a current national problem. It is imperative, therefore, that consumers who are paying for increased utility costs be accorded a fair opportunity to participate in the Commission cases that impact so severely upon them.

²² Hearings on Regulatory Reform Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 2d Sess., Vol. II, at 256 (1976).

²³ Id., at 73.

²⁴ Id., at 194.

PART IV

QUALITY OF REGULATORS

Mr. Collins is critical of the Subcommittee's proposal that representation on regulatory commissions reflect a balance between competing various interests, including the consumers, regulated industry and government. "Why," Mr. Collins asks, "should a person from regulated industry be included or excluded from consideration because of his affiliation?" Making certain, he asserts, that appointees possess a high degree of integrity should suffice.

The intent of the Subcommittee's recommendation is not to exclude a nominee because of ties with regulated industry, but to correct a pattern of imbalance that has been intensified in recent years, with more than 50% of the appointments to regulatory commissions in fiscal years 1971-1975 coming directly or indirectly from regulated industry. We do not here propose a quota system etched in stone. We suggest only this: that when a regulatory commission already includes persons selected from regulated industry, and when other factors are equal, persons with a demonstrated interest in the concerns of consumers should be sought first for vacancies that arise. This is not to suggest that commissioners with a background in regulated industry are unfair or biased as commissioners. The potential for such bias is, however, present if a commission consists overwhelmingly of such persons. Moreover, even if such bias does not exist, the credibility of agency decisions can, and has continually been, called into question.

We agree that personal integrity is of overriding importance in regulatory appointments, but would add that personal qualities such as integrity, being intangible and not readily measurable, are difficult to judge. Predicting a person's degree of integrity, when the person moves into an environment where interests and pressures can be intense, is difficult. Other criteria in addition to an assessment of personal integrity, must also be applied.

Mr. Collins also challenges the Subcommittee's criterion of "demonstrating a conspicuous sensitivity to the interests of consumers." He chooses to place his emphasis on the word "conspicuous," inferring that the report recommends the appointment of "vocal consumer activists." Both the emphasis and the inference based on it are incorrect. The report's emphasis is on the word "demonstrated", sensitivity and is placed there again because of the desirability to selecting appointees insofar as possible on the basis of tangible rather than intangible evidence.

Finally, I disagree with the contention that affiliation with the regulated industry is often the only source of expertise. Although this might have been the case when the regulatory agencies were first established, abundant talent exists outside of the regulated industry. Qualified individuals can also be found in (1) government agencies, (2)

consumer groups, (3) the academic community, and (4) business groups unrelated to the regulated industry.

INCREASING PUBLIC PARTICIPATION

Mr. Collins disagrees with the Subcommittee's view that new mechanisms to ensure effective "public" participation are needed. He does not specifically disagree with our conclusion that the cost to consumer groups of such participation is so burdensome to them that "public" input cannot be counted on in more than a few regulatory proceedings. Instead, he simply asserts that the Subcommittee's proposals would produce no tangible benefits for our citizens.

On the contrary, I believe that the Subcommittee's analysis has shown that such mechanisms are needed and are well worth the cost. For example, if effective input by a Public Counsel at the FPC could have convinced the Commission to lower the "new" gas rate by only 10%, consumers would save \$150 million in the first year alone. This represents many times the cost of all of our recommendations for public participation.

The Minority View raises no objection to the Subcommittee's FDA example regarding its approval of chymopapain as an Investigational New Drug, where lack of public participation may have resulted in numerous injuries and loss of life, and misses the point on the two examples challenged. In the NHTSA example, the participation of the Center for Auto Safety did help protect the public safety. Consumers were fortunate that the Center had the time and money to participate. Groups such as the Center operate on an extremely limited budget²⁵ and only comment on a few of the many agency proceedings. This example illustrates that public participation can balance the administrative process, but needs a more stable source of funding so that it can truly be effective. Automobile manufacturers can appear before NHTSA and can pass the cost along to the car buyers. But those same car buyers have no means to protect their own interest in safety. I believe that the government can and should do more to ensure that consumer views will be presented effectively in the regulatory process.

Mr. Collins also misunderstands the Subcommittee's analysis with respect to FPC Opinion No. 770, which nearly tripled the wholesale price of "new" natural gas. He asserts that because some consumer representatives were allowed to submit written comments as a part of the massive record in this case (the public record alone filled eight file drawers), there was significant and meaningful public participation.

There were two major "public" participants in this proceeding, the American Public Gas Association, which represented many groups, and a group of Congressmen, including myself, represented by private counsel. However, a serious deficiency in this process was the absence of any opportunity to examine and test the underlying facts. Representatives of public interest groups or of the consumer do not have the financial resources or the technical expertise of accountants, economists, or geologists to consider and evaluate the factual basis for the proposed rule. Even with public funding of such capability, however, those groups lack access to the industry's books and records which

²⁵ For example, for fiscal year 1976, the Center advised the Subcommittee, in response to its request, that it had \$150,000 for its operations.

contain the fundamental data. Absent the technical ability to review, and the availability of, the relevant factual material, public participation can be no more than a charade. In the ratemaking case before the FPC described in Chapter 13, the public participants were unable to obtain the necessary data to test the ratemaking assumptions or even to know whether such data had been submitted.

The American Public Gas Association points this out well in its application for rehearing:

As a result, without an adversary hearing, the setting of nationwide rates for gas producers is nothing more than a ritualistic exercise of computing industry rates based on industry data. . . . Since the consumers of gas have no data of their own to present, because all such information as to reserves, productivity, costs, etc., is peculiarly and exclusively within the producers' possession, and since the consumers of gas are not permitted to cross-examine any of the data the producers submit, the Commission is left to blindly accept the industry data as the basis for the rates it sets. Thus, the rulemaking proceeding is in reality a farce in which the Commission is effectively shielded from learning the truth. (Application for Rehearing, August 26, 1976, at 4.)

This problem is clearly related to the Subcommittee's recommendation that an Office of Public Counsel be established at the FPC. Such an Office, formally independent of the Commission, would certainly have more ability to persuade the Commission that access to all relevant data is a necessity in a case such as this. Moreover, by its ability to be continuously involved in Commission ratemaking proceedings, it would develop the necessary expertise to represent effectively the interests of those who pay the rapidly escalating utility bills. I do not mean to suggest that the APGA has not done a good job, but its tools are simply limited. Indeed, as developed by this Subcommittee's investigators, a presently unreleased FPC tally of data submitted by the pipelines discloses that the cost to consumers of the FPC-approved increase in the price of natural gas will be \$2.5 billion in the first year alone, rather than the \$1.5 billion as originally stated by the Commission in Opinion No. 770.

However, the consumer advocates did not have access to the data necessary to allow them to support an assertion of this multibillion dollar figure in the course of the FPC proceeding. I believe that the citizens of this country are beginning to realize that the massive economic interests have an inordinate influence on decisions which affect their lives and their pocketbooks and to demand that the balance be redressed.

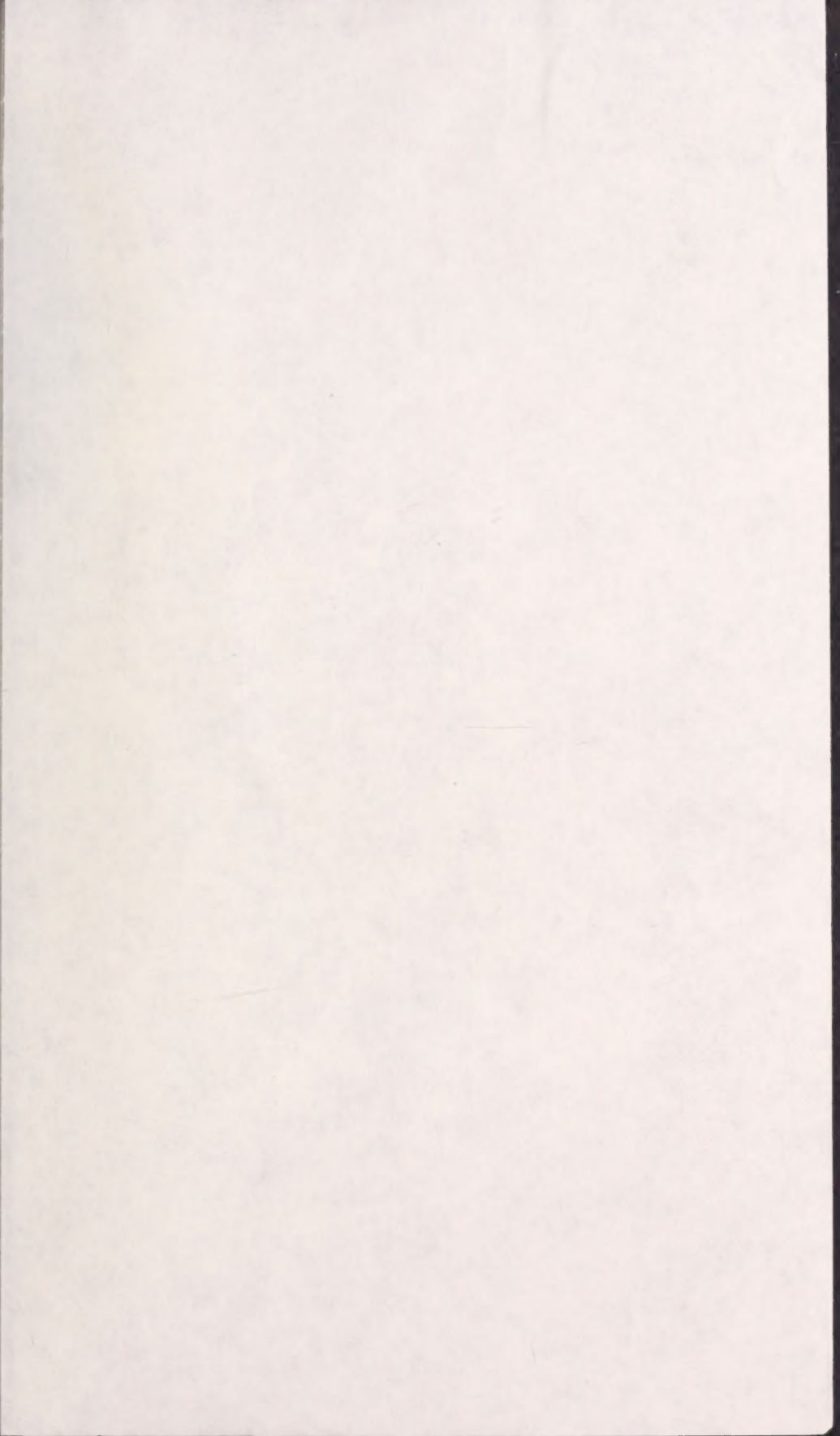
Mr. Collins seems to believe that the situation has changed since 1960 when extensive daily exchanges between the commissions and regulated industry were reported and that agencies are now hearing from consumer groups as well. Certainly consumers groups have been active and more effective given their modest resources. But, in the main, as the Report has demonstrated in its many case studies, regulatory decisions continue to be skewed heavily toward special interests. The fragmented consumer interests can rarely be adequately represented because of the financial barriers inherent in such regulatory proceedings. Only new mechanisms can ensure that the individual citizen's interest has full and fair representation.













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